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VOLUME 382

CASES ADJUDGED

IN

THE U.S. SUPREME COURT

AT

OCTOBER TERM, 1965

October 4, 1965 (Beginning of Term)
Through January 31, 1966

HENRY PUTZEL, jr.
REPORTER OF DECISIONS

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ERRATA.

290 U. S. 600, No. 124, last line: "42 F. (2d) 765" should be "13 F. Supp. 24."

305 U. S. xxix, line 8: "514" should be "415."

306 U. S. 227, lines 8–9: "*Schenck* v. *United States*" should be "*United States* v. *Schenck*."

310 U. S. 448, n. 5: "1049" should be "1409."

332 U. S. 88, line 3: "1627" should be "1637."

336 U. S. 929, last line: "62 Cal. 2d" should be "32 Cal. 2d."

372 U. S. 196, line 10: Delete "either."

381 U. S. 931, No. 13, Original: In lieu of the material dealing with counsel on the motion, substitute the following: "*Waggoner Carr,* Attorney General of Texas, *Hawthorne Phillips,* First Assistant Attorney General, *Stanton Stone,* Executive Assistant Attorney General, and *J. C. Davis* and *W. O. Shultz II,* Assistant Attorneys General, on the motion."

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.[1]

EARL WARREN, Chief Justice.
HUGO L. BLACK, Associate Justice.
WILLIAM O. DOUGLAS, Associate Justice.
TOM C. CLARK, Associate Justice.
JOHN M. HARLAN, Associate Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
POTTER STEWART, Associate Justice.
BYRON R. WHITE, Associate Justice.
ABE FORTAS, Associate Justice.[2]

RETIRED.[3]

STANLEY REED, Associate Justice.

NICHOLAS deB. KATZENBACH, Attorney General.
THURGOOD MARSHALL, Solicitor General.[4]
JOHN F. DAVIS, Clerk.
HENRY PUTZEL, jr., Reporter of Decisions.
T. PERRY LIPPITT, Marshal.
HENRY CHARLES HALLAM, Jr., Librarian.[5]

Notes on p. IV.

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NOTES.

[1] Mr. Justice Goldberg resigned on July 26, 1965. See *post*, p. vii.

[2] THE HONORABLE ABE FORTAS, of Tennessee, was nominated by President Johnson on July 28, 1965, to be an Associate Justice of this Court; the nomination was confirmed by the Senate on August 11, 1966; he was commissioned on the same date; and he took the oaths and his seat on October 4, 1965.

[3] Mr. Justice Whittaker, who retired on April 1, 1962 (369 U. S. iv, vii), resigned effective September 30, 1965. See *post*, p. xvii.

[4] The Honorable Thurgood Marshall, of New York, formerly a Judge of the United States Court of Appeals for the Second Circuit, was nominated by President Johnson to be Solicitor General on July 13, 1965; the nomination was confirmed by the Senate on August 11, 1965; he was commissioned on the same date and took the oath on August 24, 1965. See also *post*, p. xv. He succeeded the Honorable Archibald Cox, who resigned effective July 31, 1965.

[5] Mr. Hallam was appointed Librarian on November 8, 1965. See *post*, pp. xlvii, 898. He succeeded Miss Helen Catherine Newman, who died July 21, 1965. See *post*, p. xlvii.

SUPREME COURT OF THE UNITED STATES.

ALLOTMENT OF JUSTICES.

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, viz.:

For the District of Columbia Circuit, **EARL WARREN**, Chief Justice.

For the First Circuit, **ABE FORTAS**, Associate Justice.

For the Second Circuit, **JOHN M. HARLAN**, Associate Justice.

For the Third Circuit, **WILLIAM J. BRENNAN, JR.**, Associate Justice.

For the Fourth Circuit, **EARL WARREN**, Chief Justice.

For the Fifth Circuit, **HUGO L. BLACK**, Associate Justice.

For the Sixth Circuit, **POTTER STEWART**, Associate Justice.

For the Seventh Circuit, **TOM C. CLARK**, Associate Justice.

For the Eighth Circuit, **BYRON R. WHITE**, Associate Justice.

For the Ninth Circuit, **WILLIAM O. DOUGLAS**, Associate Justice.

For the Tenth Circuit, **BYRON R. WHITE**, Associate Justice.

October 11, 1965.

(For next previous allotment, see 371 U. S., p. v.)

SUPREME COURT OF THE UNITED STATES

Allotment of Justices

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, viz.:

For the District of Columbia Circuit, Earl Warren, Chief Justice.

For the First Circuit, Abe Fortas, Associate Justice.

For the Second Circuit, John M. Harlan, Associate Justice.

For the Third Circuit, William J. Brennan, Jr., Associate Justice.

For the Fourth Circuit, Earl Warren, Chief Justice.

For the Fifth Circuit, Hugo L. Black, Associate Justice.

For the Sixth Circuit, Potter Stewart, Associate Justice.

For the Seventh Circuit, Tom C. Clark, Associate Justice.

For the Eighth Circuit, Byron R. White, Associate Justice.

For the Ninth Circuit, William O. Douglas, Associate Justice.

For the Tenth Circuit, Byron R. White, Associate Justice.

October 11, 1965.

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[1] For next previous allotment, see 371 U. S., p. v.

RESIGNATION OF MR. JUSTICE GOLDBERG.

SUPREME COURT OF THE UNITED STATES.

MONDAY, OCTOBER 4, 1965.

Present: MR. CHIEF JUSTICE WARREN, MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE CLARK, MR. JUSTICE HARLAN, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE WHITE.

THE CHIEF JUSTICE said:

"With the concurrence of my colleagues, I announce the resignation of Mr. Justice Goldberg who resigned as an Associate Justice of this Court since we last met to become the United States Representative to the United Nations.

"Justice Goldberg is a native of Chicago, Illinois. He attended the public schools of that city and Northwestern University where he graduated from the Law School with highest honors.

"With the exception of the time he served with distinction in the Armed Forces during World War II, he practiced law for over thirty years in Chicago and in Washington, D. C. During all of that time he pursued good causes and without regard as to whether they were popular or not.

"In 1961, he was appointed Secretary of Labor by the late lamented President John F. Kennedy, and served in that capacity until October 1, 1962, when he was appointed an Associate Justice of this Court. His service here was brief but distinguished, and he has left an indelible mark on our jurisprudence.

"The Court would make this announcement with deep regret except for the fact that Justice Goldberg has accepted another post of duty in our Government which he in conscience felt he could not decline. We wish him every happiness and success in his new position.

"Our appreciation of our association with Justice Goldberg and for his fine service to the Court is amplified in a letter to him which, together with his letter to the members of the Court, will be spread upon the Minutes of the Court."

SUPREME COURT OF THE UNITED STATES,
CHAMBERS OF JUSTICE ARTHUR J. GOLDBERG,
Washington, D. C., 20543, July 26, 1965.

MY DEAR BRETHREN:

It is with the deepest of regrets that I take my leave of you. These three short but eventful years have been the happiest and most rewarding of my life, not only because service here is the dream of every man of law and because of the opportunities for creative and useful work, but also because of the kindness and fellowship which each of you has shown to me.

As you must know, only the most compelling call to duty could bring me to leave this Court and your dedicated and joyous company. But that call did come, and I could not refuse.

In those days and years ahead allotted to me, my thoughts will often be of you and your unstinting efforts to bring equal justice under law to all of our countrymen. And I trust that I shall enjoy the benefit of your prayers as I undertake my part in our country's striving to bring peace and the rule of law to all mankind.

Sincerely yours,
ARTHUR J. GOLDBERG.

THE CHIEF JUSTICE
MR. JUSTICE BLACK
MR. JUSTICE DOUGLAS
MR. JUSTICE CLARK
MR. JUSTICE HARLAN
MR. JUSTICE BRENNAN
MR. JUSTICE STEWART
MR. JUSTICE WHITE

SUPREME COURT OF THE UNITED STATES,
CHAMBERS OF THE CHIEF JUSTICE,
Washington, D. C., 20543, October 4, 1965.

Honorable ARTHUR J. GOLDBERG,
United States Representative to the United Nations,
New York, New York.

DEAR AMBASSADOR GOLDBERG:

Your letter advising us of your resignation from the Court was received with deep regret. In the three years you were with us, you became so much a part of the Court and of our lives that we shall miss you greatly.

We fully realize that your decision to leave was a difficult one to make. And we also realize that in making that decision you were moved by a profound sense of duty to our country and to the world of which we are all a responsible part. Men of your stature do not resist a call to duty in times of crisis regardless of the sacrifice involved, and we honor you for obeying the demand of your conscience. Also, we believe that those great qualities which made you an invaluable member of this Court will guide you in your efforts to achieve honorable peace for everyone in this troubled world.

Our heartfelt good wishes will always be with you, and we will feel that as you pursue your cause our ties to you will be continuously strengthened regardless of the time or distance between us.

Sincerely,

EARL WARREN
HUGO L. BLACK
WILLIAM O. DOUGLAS
TOM C. CLARK
JOHN M. HARLAN
WILLIAM J. BRENNAN, JR.
POTTER STEWART
BYRON R. WHITE

APPOINTMENT OF MR. JUSTICE FORTAS.

SUPREME COURT OF THE UNITED STATES.

MONDAY, OCTOBER 4, 1965.

Present: MR. CHIEF JUSTICE WARREN, MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE CLARK, MR. JUSTICE HARLAN, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE WHITE.

THE CHIEF JUSTICE [after announcing the resignation of Mr. Justice Goldberg, *ante,* p. III] said:

"We are fortunate, however, that his successor was appointed to fill the vacancy before the opening of our 1965 Term. We welcome him today.

"The President, with the advice and consent of the Senate, has appointed the Honorable Abe Fortas of Tennessee an Associate Justice of the Supreme Court. Justice Fortas has taken the Constitutional Oath administered by the Chief Justice. He is now present in Court. The Clerk will read his commission. He will then take the Judicial Oath, to be administered by the Clerk, after which the Marshal will escort him to his seat on the Bench."

The Clerk then read the commission as follows:

LYNDON B. JOHNSON,

PRESIDENT OF THE UNITED STATES OF AMERICA,

To All Who Shall See These Presents, Greeting:

KNOW YE: That reposing special trust and confidence in the Wisdom, Uprightness, and Learning of Abe Fortas of Tennessee I have nominated, and, by and with the advice and consent of the Senate, do appoint him Associate Justice of the Supreme Court of the United States and do authorize and empower him to execute and fulfill the duties of that Office according to the Constitution and Laws of the said United States, and to Have and to Hold the said Office, with all the powers, privileges and emoluments to the same of right appertaining, unto Him, the said Abe Fortas, during his good behavior.

In testimony whereof, I have caused these Letters to be made patent and the seal of the Department of Justice to be hereunto affixed.

Done at the City of Washington this eleventh day of August, in the year of our Lord one thousand nine hundred and sixty-five, and of the Independence of the United States of America the one hundred and ninetieth.

[SEAL] LYNDON B. JOHNSON.

By the President:

NICHOLAS DEB. KATZENBACH,
Attorney General.

The oath of office was then administered by the Clerk, and MR. JUSTICE FORTAS was escorted by the Marshal to his seat on the bench.

The oaths taken by MR. JUSTICE FORTAS are in the following words, viz.:

I, Abe Fortas, do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter.

So help me God.

ABE FORTAS.

Subscribed and sworn to before me this 4th day of October A. D., 1965.

EARL WARREN,
Chief Justice of the United States.

I, Abe Fortas, do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as Associate Justice of the Supreme Court of the United States according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States.

So help me God. ABE FORTAS.

Subscribed and sworn to before me this 4th day of October A. D., 1965.

JOHN F. DAVIS,
Clerk of the Supreme Court of the United States.

PRESENTATION OF THE SOLICITOR GENERAL.

Supreme Court of the United States.

MONDAY, OCTOBER 11, 1965.

Present: Mr. Chief Justice Warren, Mr. Justice Black, Mr. Justice Douglas, Mr. Justice Clark, Mr. Justice Harlan, Mr. Justice Brennan, Mr. Justice Stewart, Mr. Justice White, and Mr. Justice Fortas.

Mr. Attorney General Katzenbach presented the Honorable Thurgood Marshall, of New York, Solicitor General of the United States.

The Chief Justice said:

"Mr. Solicitor General, the Court welcomes you to the performance of the important duty with which you are specially charged, the duty of representing the Government at the Bar of this Court in all cases in which it asserts an interest. Your commission will be recorded by the Clerk."

RESIGNATION OF MR. JUSTICE WHITTAKER.

SUPREME COURT OF THE UNITED STATES.

MONDAY, OCTOBER 18, 1965.

Present: MR. CHIEF JUSTICE WARREN, MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE CLARK, MR. JUSTICE HARLAN, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, MR. JUSTICE WHITE, and MR. JUSTICE FORTAS.

THE CHIEF JUSTICE said:

"On behalf of the Court, I announce that Honorable Charles E. Whittaker, who retired on April 1, 1962, because of disability, has resigned his commission as an Associate Justice of the Supreme Court (retired) effective September 30, 1965.

"In his letter to the President, Justice Whittaker advised that since his retirement he has regained his health, and he now wishes to be freed from the occupational restrictions that necessarily inhere in his retired status, so that he may, with propriety, engage in other activities.

"We are very pleased to know that Justice Whittaker has recovered his health to such an extent that he is able to resume other activities, and we wish for him success and happiness in all of his future endeavors."

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PROCEEDINGS IN THE SUPREME COURT OF THE UNITED STATES IN MEMORY OF MR. JUSTICE FRANKFURTER.*

MONDAY, OCTOBER 25, 1965.

Present: MR. CHIEF JUSTICE WARREN, MR. JUSTICE BLACK, MR. JUSTICE CLARK, MR. JUSTICE HARLAN, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, MR. JUSTICE WHITE, and MR. JUSTICE FORTAS.

Mr. Solicitor General Marshall addressed the Court as follows:

"Mr. Chief Justice, may it please the Court:

"A meeting of the Bar of the Supreme Court was held at 11:00 this morning in honor of the memory of Mr. Justice Felix Frankfurter. Former Solicitor General Cox, who initiated and completed the plans for that meeting, was selected as chairman, and the Honorable John F. Davis was selected as secretary of that meeting. Resolutions were adopted and will be read by Honorable Dean Acheson, chairman of the Resolutions Committee."

The Honorable Dean Acheson addressed the Court as follows:

"The resolutions unanimously adopted are as follows:

" 'RESOLUTIONS

" 'Mr. Justice Frankfurter because of grave impairment of his health retired on August 28, 1962, from active service on the bench. For three years he gallantly bore his afflictions and died on February 22, 1965, in his eighty-third year.

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*Mr. Justice Frankfurter, who retired August 28, 1962 (371 U. S., IV, VII), died in Washington, D. C., on February 22, 1965. The services were private. (380 U. S., IV, VII.)

" 'Felix Frankfurter's birth on November 15, 1882, to Jewish parents in Vienna, Austria, little betokened a career in America as legal scholar, teacher, and jurist. The family, the Justice has said, was an intellectual one, though he admits to having been "more bookish" than the others, excepting his paternal uncle, an "oppressively learned man," the "librarian-in-chief of the great library of the University of Vienna." His Viennese origin was treasured by the Justice. Though time had dimmed memory of detail, he delighted in attributing to it his *joie de vivre*—what he called the Blue Danube side of his nature.

" 'When at the age of twelve Felix Frankfurter landed in New York, he had never heard a word of English spoken. Two years later, on graduation from Public School 25, he was reciting Chatham's speech on the conflict with America. At the school his beloved benefactress, Miss Hogan, had threatened with the rod any boy caught speaking German with him. He read omnivorously. At Cooper Union the periodical room brought on that addiction to newspapers from which he could never free himself. There, too, were lectures and, above all, debates—ecstatic fare. The reading rooms at the Ottendorfer, the Astor and the Lenox libraries all knew him.

" 'His vocabulary, over the years, became immense and exotic. Many of us have often turned from one of his pages to the dictionary to look up gallimaufry, for example, or hagiolater or palimpsest. He delighted in English words; but was not so happy with English style. His continued to be involved, often ornate, carrying a touch of the baroque. His best writing is his speech transcribed.

" 'Once he had firm grasp of the language, nothing could stop the flood of achievement. What enables one to be sympathetic with such continuous and unqualified success is an initial failure. He had set his heart on winning a Pulitzer scholarship to the Horace Mann School. But he failed. Looking back on this disappointment, he found a curious ground for comfort in accepting kismet. "But if I had gone to Horace Mann, I would doubtless have gone to Columbia, and beyond that I don't know—Columbia Law I suppose . . . . These people who plan their careers—I have so little respect for them . . . ." His path was laid out for him. He followed it with submission and with joy. It led not to Columbia but to City College and to the Harvard Law School, the absorbing love of his life.

" 'At the turn of the century, student life at City College was more European than American collegiate. The students lived and studied in the midst of a great city, not segregated from it but a part of it. They learned the discipline of hard work in crowded and distracting conditions, completing half of high school and all of a college course in five years. They found relaxation in the East Side tea shops and coffee rooms, drinking tea and rum out of tall glasses and talking with all comers until dawn. The course was prescribed and rigid. Young Frankfurter completed it with high honors, gathering on the way yet another joy from language. He found great interest in the delicacy and precision of Greek until, unhappily, poor teaching stifled it. For the most part he taught himself in his usual way. "I read a lot," he has reported, "a terrible lot."

" 'After City College there was no money for law school, so a year was set aside to earn some as a clerk in the Tenement House Department of the City of New York. Again he toyed with fate. One fine spring day in 1903, with ten dollars in his pocket, he set out on foot for Morningside Heights to matriculate at Columbia Law School. But kismet would no longer be denied and events moved quickly to settle the matter.

" 'The prospective matriculant had not gone far when he met a friend who persuaded him to spend so fine a day—and the matriculation fee—more fittingly at Coney Island. Soon afterwards the family doctor, examining his lungs, advised strongly against continuing in New York and in favor of country air. Finally, a brother of a friend in the Tenement House Department, a first-year man at Harvard Law School, home for the Easter holiday, persuaded him that Harvard was practicable financially, that Cambridge was about as far into the country as a New Yorker should venture, and that they should room together the next year. Thus was fate fulfilled and Frankfurter's distrust of those who plan their lives confirmed.

" 'Not only the Law School but Harvard University as a whole offered inexhaustible joys. A Lucullan banquet lay before him or, as he more earthily put it, "a free lunch counter." "I went to this and that, went to the library, read, roamed all around, and just satisfied a gluttonous appetite for lectures, exhibitions, concerts." His roommate protested; mid-year tests brought him up with a jerk. In all three years he led his class, still stubbornly, but more moderately, insisting that "I don't think law requires that I stifle all other interests." It never did.

" 'One would not go wrong in thinking that Felix Frankfurter's years before coming to the bench were his happiest, as they were his freest, years. He never thought of them as years of preparation. They were years of gloriously self-justifying life in action. Nonetheless, they gave him rare insights into the changing social and economic facts of life in this country, whether he represented the federal government on the legal and social frontier, or, at the Law School, inspired young men to adventure by the tales he brought back from his forays into the surrounding battle.

" 'Hardly had Frankfurter left the Law School in 1906 for the law offices of Hornblower, Byrne, Miller and Potter in Manhattan, when he was lured away by an offer of a 25% reduction in salary and unlimited work. The offer came from Henry L. Stimson, President Theodore Roosevelt's newly appointed United States Attorney for the Southern District of New York. Frankfurter was inclined to worry about the ethics of this desertion until

Professor Ames wrote him to "follow the dominant impulses of your nature," which, of course, he was about to do anyway.

" 'Rarely can a decision or event in a man's life be called crucial. This was one. Colonel Stimson was a noble man, of towering integrity, an old Roman of the days of the Republic. Frankfurter's standards of work, of fairness, of integrity—as he himself often said—were forged in his years with Stimson.

" 'The times, too, were moving: The Progressive Era was in gestation. The United States Attorney's office, a storm center in itself, brought actions against the railroads for rebates, against sugar companies for customs frauds, against Mr. Charles W. Morse for banking manipulations disclosed by the panic of 1907. Mr. E. H. Harriman was haled before a United States court to answer questions of the Interstate Commerce Commission about his acquisition of control of railroads. The federal government had moved against business. This was revolution. People spoke of it, said Frankfurter, as they might have of the attack on the Bastille. But not all the work involved great matters. The young assistant tried run-of-the-mill criminal cases on his own and was assigned responsibility for the troubles of the 100,000 immigrants a month who passed through Ellis Island, since Stimson thought he was "likely to have more understanding of these problems than some of the other lads in the office."

" 'Soon the scene shifted. Stimson left office with Roosevelt and ran for Governor of New York. Frankfurter was soon in the fight, too, traveling with both the candidate and his supporter, the former President, and finding politics as absorbing as the law courts. Stimson lost the election of 1910. Almost at once he went to Washington as Secretary of War, taking Frankfurter with him.

" 'Again a new life opened vistas onto a new world. In 1910 the War Department was not only the War Office but the Colonial Office and Office of Public Works as well. Its jurisdiction had followed the flag in its unplanned course from the Caribbean, across the Isthmus of Panama, to the Southwest Pacific. Manifest destiny brought in its train governmental, administrative, and constitutional problems beyond the farthest imagination of the framers at Philadelphia. In two administrations Felix Frankfurter was engaged in adapting eighteenth- and nineteenth-century constitutional conceptions to the world-encompassing needs of an imperial power.

" 'When this country entered the First World War, President Wilson called him back to Washington for a task as different as it was tough. Industrial disorder in the West and Southwest was paralyzing war production. A syndicalist movement, the Industrial Workers of the World, had taken over labor at the copper mines, lumber camps, and some other vital industries. It was being met by organized vigilantes using arms and deportation. The President's Mediation Commission, a group of realists under the chairmanship of Secretary of Labor William B. Wilson and with Felix Frankfurter as Counsel, plunged into this cauldron of hatred. One situation after another yielded to calmness and persistence. Counsel's contribution, it is not surprising to learn, was his resourcefulness in diminishing "hated words" and "the irrationalities of strife." When Counsel for the Commission went back to the Law School to resume teaching, he had had rare schooling in the realities of American industrial life.

" 'It is accepted belief that the invitation which came in 1914 to join the faculty of the Harvard Law School posed a difficult decision for him between the active and the contemplative life. The Justice himself gave currency to the idea and, indeed, made public a long memorandum of his own to himself on the pros and cons. But the difficulty was largely theoretical, since, in fact, Frankfurter never chose; he embraced both alternatives; he lived two lives without skimping either one—the life of the teacher and scholar and life on the firing line of all the conflicts of his time. He rolled them into one. Scholarship for him was concerned not only with the history of the past but with the most current reports. Significantly one of his first efforts was with other lawyers to indict the witch-hunting excesses of Attorney General A. Mitchell Palmer.

" 'For twenty-five years Felix Frankfurter's prodigious energies were concentrated on the growing edge of the law. With Dean Roscoe Pound he directed the Cleveland Survey of the administration of criminal justice, a pioneering study. What brought home to Felix Frankfurter with searing intensity the responsibility of the state in criminal prosecution were the murder convictions of Sacco and Vanzetti, a shoe worker and a fish peddler. He believed that their trial had been unfair and their convictions due to their political and economic beliefs. He threw himself passionately into the attempt to set aside the convictions. The controversy rose to international proportions, but the men were executed.

" 'Gradually his interest centered on the law applicable to public agencies, resulting in a phenomenal outpouring of papers, some by his pupils, some in collaboration with several of them, and others his own work. These dealt with labor injunctions, judicial review of administrative decisions, evidence and procedure before administrative bodies, the history of diversity jurisdiction, and so on. His own work centered on the constitutional views of Justices Holmes and Brandeis and Chief Justice Taney, and, in collaboration with James M. Landis, on a book and annual articles on The Business of the Supreme Court.

" 'Professor Alexander Bickel has written:

" ' "There were great scholars of the Constitution before Mr. Frankfurter, but he was the first scholar of the Supreme Court. The study he pursued was not constitutional law, but institutional law. . . . He studied the sources, the volume, and the nature of the Court's business, over time and contemporaneously, and perceived anew the Court's role in American government. . . ." Felix Frankfurter: A Tribute, p. 197 (Mendelson ed. 1964).

" 'The very nature of the Court's position in the scheme of American government called upon it to be wisely selective in the choice and restrained in the number of cases it heard and decided. He had no patience with charges that in denying review the Court was, as the press put it, "ducking the issue." The Court was not a knight-errant sworn to search out and right wrongs and slay dragons of precedent. It was far better to leave a decision unreviewed than for the Supreme Court to decide it wrongly or prematurely. He believed that the issues the Court chose to review should be ripe for decision and needed time for collective deliberation and decision, and for careful and persuasive exposition of the decision so necessary for its acceptance by the country. Congress had responded most generously to the Court's request for power to control and limit its own docket; to use the power effectively required, so he thought, stern selectivity.

" 'In 1939 Felix Frankfurter's life seemed firmly and happily settled in its course at Harvard. Without hesitation he had declined Governor Ely's offer of an appointment to the Supreme Judicial Court of Massachusetts and without regret heard from President Roosevelt that he could not appoint him to the vacancy on the Supreme Court left by Justice Cardozo's death. Then without warning or explanation Roosevelt reversed that decision and sent his nomination to the Senate. Curiously, for one so frequently in the storm center of controversy, only a few cranks opposed the nomination. The Senate unanimously confirmed it. The new Justice took his seat on January 30, 1939.

" 'The year was a turning point in history as well as in the history of the Supreme Court. Time had just ended the thirty-year war between judicial conceptions of the nineteenth century and social and economic conditions of the twentieth, a war into which Professor Frankfurter had thrown on the side of modernity his professorial and polemical power. When Justice Roberts freed himself from the bonds of *stare decisis* in *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379 (1937), the last of the minimum wage cases, "freedom of contract" became an obsolete phrase and social legislation in the United States could move forward again. Another powerful obstacle, the Commerce Clause, was outflanked by doctrines, not new but long neglected, which Professor Frankfurter had advocated. See the chapter on Taney in The Commerce Clause Under Marshall, Taney and Waite.

" 'Just as an epoch had ended in the history of the Court, one was ending in the history of the world. The epoch of the nineteenth century, long undermined and tottering, the epoch of One World, of *Pax Europa,* was about to come crashing down about our ears. Whatever the new issues of the post-war world and the post-war Court would be, they would not be those in which the new Justice had served with such zest under his great heroes and captains, Stimson, Holmes, and Brandeis.

" 'The issues changed, but not the nature of the Court or the imperatives of its function and of its position in the American government, and not the ultimates of the democratic faith. More specifically, the separation of powers, federalism, the First Amendment, procedural due process, and the integrity and independence of the act of judging, and even a measure of substantive due process and equal protection—for Justice Frankfurter as for Professor Frankfurter, these were constants.

" 'There is a remarkable coherence and consistency in his outlook before and after his change of title—most remarkable for one who, before his accession, was so ardently engaged in the pursuit of immediate practical ends, who before and after spoke so often on almost all important aspects of the Court's work, and whose professional lifetime spanned two sharply divided periods in the Court's history. No doubt, in his journalism especially, sparks were sometimes struck off which were extinguished and vanished as they rose. But his basic convictions, and of course his temperamental inclinations, endured and had decisive effect on issues old and new, because they were not drawn from the issues of the day.

" 'By nature an impatient man, and equally naturally a reformer, he managed somehow not to be both together. The struggle to change social, economic, and political conditions was for him the struggle to conserve the institutions and the values of the society in changed conditions. What is to be conserved must first be understood, and understood afresh, time and again, for its essence and its necessities are not conveyed by verbal formulas; they reveal themselves only in the full factual context of the past and present. History and a willingness to know that the conditions of life change in response to forces that the law does not create but must recognize—these are the tools of the true conservative. They were Justice Frankfurter's, as they had been Justice Brandeis's. In using them, the conservative is a creative reformer.

" 'During the twenty-three years of Justice Frankfurter's tenure, the Court not only abandoned old constitutional restraints on social and economic reform, but adopted fresh and hospitable habits of statutory construction. And it opened for itself new and important lines of influence under the First Amendment, in the administration of criminal justice, and in effectuating equal treatment of the races. In these enterprises Justice Frankfurter participated and often led. The reapportionment case of 1962, *Baker* v. *Carr,* 369 U. S. 186, was the only major new departure against which the Justice wholly and firmly set his face, and perhaps the final word has not yet been said.

" 'Justice Frankfurter participated and led, but after his fashion, subject to the cautions and restraints that were deeply imbedded in his view of the judicial function and in his philosophy of history and of government. Whether he led or participated or dissented, he left his mark on the evolution of the principles announced by the Court, and, therefore, on their content, on the timing and manner of their announcement, and on the methods chosen to enforce them.

" 'From the beginning to the end of his service, in an unrelenting line of decisions, he faithfully realized the promise of the Fifteenth Amendment. *Lane* v. *Wilson,* 307 U. S. 268 (1939); *Terry* v. *Adams,* 345 U. S. 461 (1953); *Gomillion* v. *Lightfoot,* 364 U. S. 339 (1960). His apt sentence, in the first of these cases, "The Amendment nullifies sophisticated as well as simple-minded modes of discrimination" (307 U. S., at 275), can serve as a chapter heading for the Court's achievements under both the Fourteenth and Fifteenth Amendments.

" 'In the field of criminal law, Justice Frankfurter insisted upon civilized standards of justice in the federal courts, objecting to procedures which he believed impaired basic liberties. See *Harris* v. *United States,* 331 U. S. 145, 155 (1947). He was not troubled that constitutional safeguards were so often invoked by dubious characters (*id.,* at 156), insisting upon "conviction of the guilty by methods that commend themselves to a progressive and self-confident society." *McNabb* v. *United States,* 318 U. S. 332, 344 (1943). In the *McNabb* case and in *Mallory* v. *United States,* 354 U. S. 449 (1957), Justice Frankfurter, speaking for the Court, held inadmissible confessions obtained in protracted post-arrest interrogation before arraignment and without counsel for the defense.

" 'The role of the Supreme Court in reviewing state-court criminal proceedings he saw as limited to guaranteeing that "fundamental principles of liberty and justice" are upheld. *McNabb* v. *United States, supra,* p. 340. He acknowledged that there were many issues on which sincere exponents of constitutional rights could differ; resolution of these issues he believed to be the province of the state courts in the exercise of their judgment. See *id.,* at 340; *Wolf* v. *Colorado,* 338 U. S. 25 (1949). Where, however, state courts refused to protect individuals from conduct offending the basic canons of decency and fairness, Justice Frankfurter did not hesitate to act. *Rochin* v. *California,* 342 U. S. 165 (1952).

" 'Courts in a democratic society, he thought, should defer to elected officials who had resolved conflicting legislative policies, retaining only the determination whether legislation is so unrelated to the experience and feelings of the community as to be destructive of popular rights. *American Federation of Labor* v. *American Sash & Door Co.,* 335 U. S. 538, 542 (1949) (concurring opinion). Popular rule he saw as a moral and practical imperative, a view which led him to support the constitutionality of the Smith Act, *Dennis* v. *United States,* 341 U. S. 494, 517 (1951) (concurring in affirmance), and of the compulsory flag salute in West Virginia's public schools, required without regard to religious scruples, *Flag Salute Cases,* 310 U. S. 586 (1940), 319 U. S. 624, 646 (1943) (dissenting opinion).

" 'He often said that "the most fundamental principle of constitutional adjudication is not to face constitutional questions but to avoid them, if at all possible." *United States* v. *Lovett,* 328 U. S. 303, 320 (1946) (concurring opinion). That this is not a negative principle in the hands of a resourceful judge, the Justice showed when he found a way to depart for the first time in over half a century from the judicial practice of "hands off" congressional investigations. *United States* v. *Rumely,* 345 U. S. 41 (1953).

" 'Yet when time and occasion were ripe, he did not shrink from the duty of judicial review. The historian of the Court will find Justice Frankfurter solidly aligned in the great collegial effort of school desegregation cases, *Brown* v. *Board of Education,* 347 U. S. 483 (1954), 349 U. S. 294 (1955); *Cooper* v. *Aaron,* 358 U. S. 1, 20 (1958) (concurring opinion). He insisted that a mature and self-reliant people were not meant to be insulated from the printed word as if they were children, *Butler* v. *Michigan,* 352 U. S. 380 (1957); and in the same spirit that the college classroom may not be the object of official intrusion, *Sweezy* v. *New Hampshire,* 354 U. S. 234, 255 (1957).

" 'Idealist, optimist, and teacher, he found in Justice Holmes, his hero, his inspiration, a joy and spur to his spirit. Justice Brandeis was his mentor and guide. Like the latter he saw himself performing an educational role. He was a teacher because of his faith in democracy. With rare exceptions, he accepted the consequences of popular rule, and did not lightly brandish the Constitution to ward them off. If the people erred, the remedy for the most part was education.

" 'But he was a professor as well as a teacher, and could not shed the habits of the classroom, which are not perhaps the most useful or becoming for the teacher-at-large. He delighted in recounting how more than once Chief Justice Hughes at Conference would begin to address him as "Professor Frankfurter" before quickly correcting himself to "Justice Frankfurter." Characteristically this ended on one occasion with the Justice telling the Chief Justice that he need not apologize in correcting himself. "I know of no title that I deem more honorable than that of Professor of the Harvard Law School." (Of Law and Life and Other Things That Matter, p. 28.) It is a safe surmise that the teacher and practitioner of communicable reason, and the professor, manifested themselves not only in published opinions but in Conference and in the other intimate relations of the Justices. An independent and even a surprisingly private person, he had a religious respect for the independence of others. But the Court is in its way a continuous seminar, in and out of session, and we may be sure that Justice Frankfurter was a vigorous and continuous participant.

" 'As much as any of the men who have sat here, no less than Justices Brandeis or Van Devanter or Chief Justice Taft, he was painstakingly interested in the Court's methods and routines of conducting its business. In a small group of self-reliant men working with very little staff, he thought nothing too trivial for improvement, nor any effort too great to foster the most favorable atmosphere for maturing the Court's deliberative process. Only those who served with him can yet know the full value of his contribution to the inner organization and procedure of the Court. Outsiders may speak however of Justice Frankfurter's deep attachment to an institution, which was the focus of his professional life for over half a century.

" 'The attachment was passionate and idealistic. He loved the Court not so much for what it was as for what it could be. If he felt on occasion that it fell short of his ideal, he scolded, pointing to what he believed to be faults and defects. For in the Court, the object of his passion, he could find no shortcomings tolerable. He had a vision, at once splendid and precise, restricted and magisterial, of the greatness of the Court's calling. Greatness for this Court, he held, was not a mere aspiration, but a duty and a necessity: Wherefore, it is

" '*Resolved,* That we, the Bar of the Supreme Court of the United States, deeply saddened by the death of Mr. Justice Frankfurter, record our loss of the guidance and inspiration of a mentor who led some of us into the study of the law and whose influence from the Bench has brought out the professional best in all of us, both by his clear delight in it and by his impatience with less; of a judge who joined learning in the law and its history with love and respect for it, and added to his profound knowledge of this Court, its history and its business, veneration for its unique and powerful place in our government; of a fellow citizen whose intense love of our country compelled complete devotion to its precious and unique values and to the preservation of the institutions designed to safeguard them: It is further

" '*Resolved,* That the Chairman of our Committee on Resolutions be directed to present these Resolutions to the Court with the prayer that they be embodied in its permanent records.' "

Mr. Attorney General Katzenbach addressed the Court as follows:

"Mr. Chief Justice, may it please the Court:

"The Bar of this Court met this morning in memory of Felix Frankfurter, who was an Associate Justice of the Court from January 30, 1939, until August 28, 1962, and who died on February 22, 1965. Few men have devoted as much of themselves to this Court—it was, as the Justice said in expressing to the President his reluctance at leaving the Court, 'the institution whose concerns have been the abiding interest of my life'—and few men have had so much of themselves to give: His was a towering intellect; he had the keenest of minds and the most facile of pens; he brought to the Court his boundless love of life and his work; and his understanding of the Nation and respect for its institutions could not have been more profound. Unquestionably, his service here was the triumphant culmination of the life of one of the great public men of the Century, as well as one of the brightest chapters in this Court's distinguished history.

"I need not remind those who are gathered here of the emptiness which his passing has left. In this room especially we recall the vivid and crackling excitement which was inevitably generated when he questioned counsel—challenged would perhaps be more appropriate—or delivered an opinion. Those marks of the Justice are lost to us except in memory. Nor shall I attempt to speak of his rich and varied life and accomplishments outside the Court. Let me speak rather of what I believe to be his principal legacy to this and later generations—his forcefully articulated conception of the role of courts, and in particular of this Court, in the American political system.

"We should first understand something of the background and experience of the man. As a poor immigrant boy who by sheer force of intellect and character achieved great eminence in the public life of his adopted country, he knew at first hand, and passionately believed in, the promise of American life. The years before he came to the Court, moreover, coincided with the great reform era of the first decades of this century—a period when Congress and the President, and even more, perhaps, State legislatures, were embarking upon programs of bold experimentation in social justice and reform. In that day, judicial decisions which took a restrictive view of the regulatory powers of the State and Nation were a major stumbling block. Himself an impassioned reformer, Justice Frankfurter saw that the American experiment with democracy is a workable one—that government by the people through their elected representatives *can* be vital and progressive; and he saw that the courts of that day, in contrast, were remote from popular currents, and consequently ill adapted to function as an independent organ of social policy.

"His career in government and as a professor of law at Harvard confirmed the lessons of his youth. He came into contact with Holmes, Brandeis and Learned Hand, whom he revered and whose fundamental views he shared, although he imbued those views both with his own passionate nature and with his own unique sense of the values of American institutions. His own researches added to his knowledge. His brilliant pioneering study of the labor injunction, for example, showed that there might be areas of social conflict to the resolution of which the processes of the courts were inherently ill suited. More important, at Harvard he became the first systematic student of the Supreme Court as an institution. He acquired a scholar's understanding of its strengths and limitations, and came to believe in the Court's indispensable historic role as the arbiter of fundamental conflicts of power within the American political system, concluding that its success in this role depended in very significant measure upon scrupulous adherence to the procedures and limitations of a court of law.

"Perhaps the most important result of his years as a law professor specializing in the study of this Court was that he became imbued with a tenacious faith in reason, and in this Court as its embodiment in the political structure. Almost a quarter century of brilliant and lively teaching, scholarship, and polemics did not fail to instill in him a profound belief in the efficacy of the rational processes of the law and a reverence for this Court as the institution of government pre-eminently fitted to bring these processes to bear upon the Nation's fundamental problems—which, as de Tocqueville observed, are inevitably presented sooner or later in judicial questions.

"These themes—faith in the American democratic experiment and reverence for this Court as the embodiment of reason applied to the problems of government—explain, I think, much of Justice Frankfurter's matured conception of the Court's role. Congress and the State legislatures, the basic organs of representative government, were, in his view, designed to make social policy; the Court was not. The Court must, therefore, in Justice Frankfurter's view, be most cautious in the exercise of its power to invalidate legislation on constitutional grounds.

"The same result followed by a slightly different route. If the Court were truly to exemplify the application of reason to government, it would have to respect the competencies of the other organs of government—Congress and the President; State courts and legislatures, federal trial judges and the federal regulatory agencies. If it went too far afield, in the long run it would only weaken itself. To the same end of preserving the Court's prestige and effectiveness, he felt that it should adhere scrupulously to the procedures and traditions of a court of law, declining to pass upon any but cases in which the issues were focused and the facts digested in accordance with the strict requirements of the adjudicative process, and discharging its duties at all times with meticulous craftsmanship and impartiality.

"It is popular today to speak of Justice Frankfurter's philosophy of the role of courts as one of 'judicial self restraint.' Thus phrased, the Justice's ideology becomes a negative conception and, indeed, a most implausible one in light of the man. For Felix Frankfurter was not a man who was either restrained or detached; he was, quite to the contrary, both deeply passionate and consumingly involved. 'He was,' as Professor Mansfield (a former law clerk) said on the occasion of his death, 'the most unreserved of men.' His view of his proper role as a judge did, it is true, require him more than once to sustain policies and results irreconcilably at war with his personal predilections, and in this particular sense he may be said to have been restrained. A sharp example of such a dilemma early in his judicial career occurred in the second flag salute case, where the Justice found himself in dissent from a decision holding that a member of Jehovah's Witnesses could not constitutionally be compelled by a State legislature to participate in a patriotic ceremony contrary to his religious beliefs. Recognizing, with unusual candor and eloquence, the line between his personal views and those he believed to be imposed upon the State legislature by the Constitution, the Justice said:

" 'One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedom guaranteed by our Constitution. Were my purely personal attitude relevant I should wholeheartedly associate myself with the general libertarian views in the Court's opinion, representing as they do the thought and action of a lifetime. But as judges we are neither Jew nor Gentile, neither Catholic nor agnostic. We owe equal attachment to the Constitution and are equally bound by our judicial obligations whether we derive our citizenship from the earliest or the latest immigrants to these shores.'

"That he nevertheless did not veer from his conception of the proper limitations of the Court bespeaks his fidelity to principle and his strong intellectual self-discipline. But it reflects much more as well—and I come now to a second important aspect of his contribution to our political and judicial philosophy. It was his belief that the Court's circumscribed role was a necessary corollary to the vigorous and progressive exercise of the policy-making function by the political organs of government, to which that function has been primarily entrusted by the Constitution, as it must be in a free society. To be sure, he did not hesitate to invalidate laws fundamentally incompatible with democracy; his consistent position in the civil rights area bears witness to that. He taught not a universal solvent for constitutional problems, but, rather, a fundamental attitude: To equate strong distaste for a statute with its unconstitutionality would unduly stifle, and might ultimately destroy, the creative forces of democracy—upon which, responsibly exercised, we ultimately depend for progress and for liberty. Courts cannot undertake comprehensively to exercise a policy-making role, and they must take care not to destroy the responsibility of those who do.

"These principles received a severe test near the close of Justice Frankfurter's judicial career, in the reapportionment case (*Baker* v. *Carr*). The ill which the Court was asked to confront was a malady of representative government itself, a malady, moreover, of the utmost gravity and nationwide in scope. Since a malapportioned legislature could hardly be expected voluntarily to reapportion itself equitably, Justice Frankfurter was faced with the hardest of choices: between judicial action that in his view would only harm the Court without promising a satisfactory solution to the problem of unequal representation (a problem that he considered political rather than judicial in character); and judicial inaction which would leave the problem without foreseeable solution. He chose the first horn of this dilemma. He spoke in these words:

"'. . . [T]here is not under our Constitution a judicial remedy for every political mischief, for every undesirable exercise of legislative power. The Framers carefully and with deliberate forethought refused so to enthrone the judiciary. In this situation, as in others of like nature, appeal for relief does not belong here. Appeal must be to an informed, civically militant electorate. In a democratic society like ours, relief must come through an aroused popular conscience that sears the conscience of the people's representatives.'

"I shall not presume to appraise the choice made. My point is that for him this was no empty rhetoric; the principles of separation of power and federalism were living guidelines, not mere cliches.

"In short, Justice Frankfurter's conception of judicial self-restraint was not solely, or even primarily, focused upon inhibiting judicial power as such. To be sure, he was concerned that expanding the Court's role beyond what he conceived to be its proper limits would deflect the Court from more basic duties, and impair its ability to discharge them adequately, and also that, outside the limited sphere of its competency, the Court would not be able to provide viable solutions to social and political problems. But he viewed the problem, at the same time, in the positive light of promoting a democratic and just society. The choice to abstain in many vital areas was for him a practical and acceptable, and, if painful, still not intolerable, choice, because he believed that in the final reckoning the representative organs of government must be relied upon to do, not shirk, their job. And he was convinced that the Court, if it took upon itself the task of righting all of the Nation's social wrongs, would find itself ill-equipped, while at the same time encouraging the political organs to shed their rightful burdens. They could be expected to act most responsibly only if accorded the full and awesome responsibility for making policy and political judgments; the best thing the Court could do, therefore, was to place the responsibility squarely where it belonged.

"I have tried to suggest that Justice Frankfurter's view of the Court as an institution constrained to act within rigorous limits rested not so much on a negative view of the Court's power and competence, but more on an affirmative faith in reason, democracy, and the genius and fortune of the American political system to secure just solutions for essentially social or political problems outside the judicial arena. This faith did not exclude an important role for the Court. On the contrary, it suggested several important creative functions. Let me mention, in the first place, the Court's unique function as a teacher (as the Justice himself had been) and exemplar. We see this in the form and texture of his opinions. Written to instruct, explicit about their assumptions and implications, freighted with history and learning, they set a new style in judicial opinion-writing. We saw it too in his probing questions from the bench and his lively exchanges with counsel. The Court, he said, is 'a tribunal not designed as a dozing audience for the rendering of soliloquies' but 'a questioning body, utilizing oral arguments as a means for exposing the difficulties of a case with a view towards meeting them.'

"As another example of the Court's creative role, consider his consistent attitude toward the other organs of government whose actions or enactments he was called upon to enforce and review. While vigorously upholding their autonomy (as in his famous *Pottsville* opinion), and reluctant to second-guess their substantive determinations, he was aggressive in interpreting statutes so as to effectuate Congress' basic purpose (however imperfectly expressed in the statutory language), and in enforcing procedural regularity to compel the policy-making organs to act responsibly.

"As a reader of statutes—really the bulk of the Court's business—Justice Frankfurter drew upon his great understanding of the Nation and its processes. He was impatient with mechanical literalism divorced from the underlying purpose. In speaking of the Fourth Amendment, he once wrote: 'These words are not just a literary composition. They are not to be read as they might be read by a man who knows English but has no knowledge of the history that gave rise to the words.' He was realistic in his assessment of the practical limitations of the legislative process—the inability to provide for every contingency of statutory application; the difficulty of verbal precision in instruments whose phrasing is inevitably a product of compromise. He also refused to abandon hope of finding behind a statute a coherent legislative design that would give meaning and direction to the search for the 'intent' of Congress. This quest for purpose involved much more, of course, than resort to the committee reports and the record of debate. To him the legislative history of an Act comprised the history of prior enactments in the field, the mood and temper of the legislators, the events that gave rise to the legislative proposals, the changes the bill underwent before it assumed its final enacted form. Above all, he tried to understand the nature of the problem that had called forth the legislative response. If the Court could divine the legislators' problem and trace in the rough the indicated lines of their solution, it was obligated to give the statute a construction that would help to achieve their end.

"This creative and masterful sensitivity in the interpretation of statutes was surely one of the most fruitful products of his conception of the Court's role. I emphasize that it was, indeed, rooted in that conception. His faith in representative government implied to him a commitment to use the special resources of the judiciary—power and skill in analysis and clarification—to help make the legislative process viable and productive, and his faith in Reason committed him to bring to the task of meaningful statutory construction all the tools of cogent analysis: history and scholarship, imagination and understanding, practical experience and common sense. The bold results of his approach are particularly evident in his famous opinions in the labor field, from *Phelps Dodge* to the second *Garmon* case.

"Justice Frankfurter's view of the Court's role also underlay his pioneering approach to cases involving a challenge to the validity of official action. He showed that the Court had a salutary role to play in encouraging responsible action. We see this most clearly in his opinions reviewing administrative decisions. In the early years of his career on the Court, such review had already gone through two phases. In the first, agency action that seemed to exceed lawful bounds had been unhesitatingly struck down, without more. In the second phase—a reaction to the first—the tendency had been to uphold agency action almost as a matter of course, and to exercise little judicial control over the administrative process. Justice Frankfurter found a middle ground between the extremes of judicial supervision and abdication—requiring that the agencies conform to procedures calculated to maximize the prospects for wise and rational decisions, while refusing in general to review the substantive wisdom of a decision responsibly made.

"His view of the Court's function in such cases is exemplified by his landmark opinion in the first *Chenery* case. The agency, in its opinion, had placed decision on one ground; in defending the decision in the Supreme Court, the agency's appellate staff relied heavily on a different ground. Speaking for the Court, Mr. Justice Frankfurter held such a procedure impermissible. Congress had lodged the responsibility for decision in the members of the agency, and not in their appellate lawyers. If agency action was to be upheld, it should be on a ground considered and adopted by the agency itself. Only then would there be assurance that agency policy was being formulated deliberately and that responsibility was being assumed, not evaded, by those whom Congress made responsible.

"This notion is epitomized in a memorable sentence from Justice Frankfurter's *McNabb* opinion: 'The history of liberty has largely been the history of observance of procedural safeguards.' What he meant, I believe, was that if the courts did no more than compel officials to follow fair and proper procedures in enforcing the law—procedures that would require them to reason before deciding and to explain the basis of their actions—substantive rights would inevitably flourish.

"Consider also Justice Frankfurter's devout insistence that the Court must never permit itself to become a party to injustice; never allow its image as an institution of reason and conscience to become tarnished. This lies at the root of the Justice's steadfast stand against the admission of confessions obtained by the third degree or other illegal means. A conviction based on such methods could not be upheld without condoning wilful disregard of our society's basic norms of fair procedure, and hence should not, he reasoned, be tolerated by the Court. The same idea explains his frank refusal to uphold convictions based on methods shocking to the conscience. His standard in the famous stomach-pump case (*Rochin* v. *California*) rested on a bold and forthright, not a negative or passive, view of the Court's role in the American governmental system—as the keeper of the public conscience.

"His emphasis on procedure and on the Court's duty to avoid injustice led him to play an active and forward role in the area of federal criminal justice. For example, it was Justice Frankfurter who, in the *McNabb* case, significantly advanced the fertile concept that this Court has a broad 'supervisory authority' over the procedures of the lower federal courts in criminal cases. And in other areas where the elaboration of policy was peculiarly appropriate for courts—such as the enforcement of the Fourth Amendment—he was also in the forefront.

"In these remarks, I have made no effort to encompass or evaluate all of Justice Frankfurter's rich contributions to the law, this Court, and the Nation. I have concentrated on his view of the Court's role in society because it seems to me that there may be a particular value in reminding ourselves of the fullness, the maturity, and the affirmativeness of his view. To be sure, his philosophy is open to challenge both generally and in its application to specific cases. Men of originality and greatness are inevitably men of controversy, and the Justice relished such battles. The heart of the matter lies beyond agreement or disagreement. Justice Frankfurter contributed to the jurisprudence of this Court a coherent, articulate, and rounded conception of its place and function in the firmament of the American system. And to the law as a whole he brought a devotion to the process of achieving justice through reason. Few have left so rich a legacy.

"May it please this Honorable Court: In the name of the lawyers of this Nation, and particularly of the Bar of this Court, I respectfully request that the resolution presented to you in memory of the late Justice Felix Frankfurter be accepted by you, and that it, together with the chronicle of these proceedings, be ordered kept for all time in the records of this Court."

THE CHIEF JUSTICE said:

"Mr. Attorney General:

"You and Mr. Acheson honor the Court in presenting to us these Resolutions of the Bar concerning the life and passing of our late-lamented Brother, Felix Frankfurter, and your felicitous words honor the profession of which we are all a part and in which he so greatly distinguished himself for more than a half century as scholar, teacher, advocate, administrator and jurist.

"Felix Frankfurter was the 77th Justice appointed to this Court. Only 18 Justices served longer than did he, and none with greater devotion or distinction. In the 23 years he graced this Bench, he wrote 263 opinions for the Court, 171 concurring opinions, and 291 dissenting opinions, making a total of 725, thus bringing into sharp focus, as he was admirably equipped to do, the argumentative issues in the problems which confront us. These opinions cover a myriad of facets of American jurisprudence and are to be found in Volumes 306 to 369 of the United States Reports. Some of these have already been noted in the Resolutions which you present and still others in your personal remarks. You have pointed up sharply both his legal philosophy and his application of it to the problems of his day.

"It would serve no good purpose to elaborate on them further at these proceedings because they are already recorded with us in a manner that will make them available to the Bench, the Bar, and legal scholars so long as constitutional principles are a matter of concern in this and other lands. And so long as they are scrutinized, they will command respect and strike sparks of interest that otherwise might be overlooked. It should, therefore, be sufficient to say that in composite they portray his profound belief in and knowledge of constitutional principles, his deep sense of patriotism, and his lifelong devotion to the Court as an institution.

"His patriotism was of a passionate kind. Like many others who have come here from other lands to live their lives in freedom, he had the deep-seated and abiding appreciation of the institutions of his adopted country. While so many others who are born here accept freedom as their birthright and fail to appreciate the necessity of guarding it zealously, he acted always as a sentinel on watch. Felix Frankfurter was ever grateful for his citizenship.

"He was accustomed to telling young people that they, too, should be grateful for it and that, like the Romans, they should consider citizenship as an office. He always asserted that the basis of good citizenship is discipline—self-discipline—and that government, like individuals, should be self-disciplined. He believed fervently in the separation of powers and in the division of powers, and that every branch of the government as well as every level of government should respect the others, and that by self-discipline each should confine its own activities strictly to its assigned functions. He believed that troublesome as some of the problems inherent in it are, Federalism is the genius of our institutions, and that it must be preserved in pristine form.

"Justice Frankfurter started early in life to discipline himself for citizenship. Two years after his arrival in this country at the age of twelve, he mastered the English language, and in due time graduated from college and Harvard School of Law. He was an assiduous student and an indefatigable reader. In neither capacity did he confine himself to the law; in neither did he have any bounds for his research. The economic, social and political problems of the day, the history behind them, as well as the current news were of equal interest to him. All of this later was reflected in his work on the Court.

"He believed citizens should serve their Government, and he did so avidly whenever called upon to do so, either full time or part time, both before and during the quarter of a century he was a Professor at Harvard. His governmental assignments were many and varied. The subjects he taught at the Law School and his writings were equally varied, but he always focused on the Supreme Court, its jurisprudence, its procedures, and its place in our Government. It is doubtful if anyone who has sat on this Court came to it better prepared for his task. In his twenty-three years here, his interest in our problems and all of life never flagged.

"How he loved knotty problems! He liked to research them; he delighted in enlightening the Court with his memoranda on difficult questions; he reveled in discussing them at Conference. His last active hour on the Court was spent lecturing on the history of the Interstate Commerce Commission on the occasion of the 75th anniversary of that agency. He never ceased to be a teacher. He believed implicitly in Mr. Justice Holmes' statement that a page of history is worth a volume of logic.

"Yes, we miss him greatly. We miss his spontaneity; we miss his wit, his charm, and his fellowship. We also miss his occasional impatience when he thought the Court was departing from the standards he conceived for it. It was always therapeutic. He was a genial colleague as well as a great Justice.

"I believe Justice Frankfurter would have approved of this kind of Memorial Session of the Court where his friends are gathered in such numbers and where they not only deplore his loss to the Nation as one of its great public servants, but also where they give vent to their joy and satisfaction of having had the privilege of knowing him and basking in the warm glow of his friendship.

"Mr. Attorney General; Mr. Acheson: On behalf of the Court, I thank you for your fine presentations today, and I ask you to convey, if you will, please, to all the friends of Mr. Justice Frankfurter and his family our concurrence with them in their devotion to his memory.

"Let the Resolutions be spread upon the Minutes of this Court."

DEATH OF THE LIBRARIAN AND APPOINTMENT OF SUCCESSOR.

SUPREME COURT OF THE UNITED STATES.

MONDAY, NOVEMBER 8, 1965.

Present: MR. CHIEF JUSTICE WARREN, MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE CLARK, MR. JUSTICE HARLAN, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, MR. JUSTICE WHITE, and MR. JUSTICE FORTAS.

THE CHIEF JUSTICE said:

"On behalf of the Court, I announce with deep regret the death of our Librarian, Miss Helen Catherine Newman, on July 21, 1965.

"Miss Newman, a native Washingtonian, received her bachelor of laws and master of laws degrees from George Washington University Law School. After her graduation, she served for 15 years as Law Librarian at her Alma Mater. In 1942, she came to the Court as an Assistant Librarian. Five years later, on March 31, 1947, she was appointed Librarian, and in 1948 became an officer of the Court by law.

"During her long service with the Court and prior thereto, Miss Newman was active in library, legal, and academic affairs, and particularly in matters concerning the American Association of Law Libraries. She was in every sense of the word a professional librarian, and in her quiet, dignified manner rendered loyal and efficient service to the Court. She was devoted to the Court, and brought to it many fine qualities which won for her the respect of the Justices under whom she served as well as the admiration and friendship of those with whom she came in contact in the course of her varied duties.

"The Court records its appreciation of Miss Newman's able and conscientious service and extends to her surviving relatives its sincere sympathy.

"On a happier note, I am pleased to announce for the Court the appointment of Henry Charles Hallam, Jr., to be Librarian of the Court succeeding Miss Newman.

"Mr. Hallam has long been a trusted and faithful employee of the Court. He first came here as a Page in 1928, and began his service with our Library as a Junior Library Assistant in 1935. In 1947, he was appointed Associate Librarian and has served in that capacity to the present time. We are confident that Mr. Hallam will continue to serve efficiently and effectively and that he will be a worthy successor to the four other individuals who have preceded him in this very important position with the Court."

For order of appointment of Mr. Hallam, see *post,* p. 898.

DEATH OF MR. HENRY A. WALLACE.

SUPREME COURT OF THE UNITED STATES.

THURSDAY, NOVEMBER 18, 1965.

Present: MR. CHIEF JUSTICE WARREN, MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE CLARK, MR. JUSTICE HARLAN, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, MR. JUSTICE WHITE, and MR. JUSTICE FORTAS.

THE CHIEF JUSTICE said:

"It is with great regret that I announce the Court has just heard the sad news of the passing of the Honorable Henry A. Wallace, former Vice President of the United States.

"Mr. Wallace was a great American who performed invaluable public service to the Nation as Secretary of Agriculture, Secretary of Commerce, and Vice President of the United States. He was a public-spirited man and a useful citizen throughout his long and purposeful life.

"The Court will now adjourn out of respect to his memory."

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1965.

FAIRFAX FAMILY FUND, INC. *v.* CALIFORNIA.

APPEAL FROM THE DISTRICT COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT.

No. 124. Decided October 11, 1965.

235 Cal. App. 2d 881, 47 Cal. Rptr. 812, appeal dismissed.

Herman F. Selvin for appellant.

Thomas C. Lynch, Attorney General of California, *Charles E. Corker,* Assistant Attorney General, and *Arthur C. de Goede* and *H. Warren Siegel,* Deputy Attorneys General, for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

MR. JUSTICE DOUGLAS, dissenting.

Appellant is a Kentucky corporation engaged in a mail-order loan business in thirty-two States. It has no offices, no agents, no employees, and no property in California. It solicits loans from California residents by mail; after a credit report is prepared by a local independent contractor, the loan application is passed on by appellant's officers in Kentucky. If the loan is approved, the check is mailed to the borrower from Kentucky.

Because appellant failed to obtain a license from the State of California and pay the annual $200 fee, appellee sought and obtained an injunction barring appellant from conducting its out-of-state small-loan business until the requisite California license was obtained. In order to obtain a license, the lender must display "the financial responsibility, experience, character, and general fitness . . . such as to command the confidence of the community and to warrant belief that the business will be operated honestly, fairly, and efficiently . . . ." Cal. Fin. Code § 24206.

Our decisions have heretofore precluded a State from exacting a license of a firm doing an exclusively interstate business as a condition of entry into the State. See, *e. g., Robbins* v. *Shelby County Taxing District,* 120 U. S. 489; *Crutcher* v. *Kentucky,* 141 U. S. 47; *Eli Lilly & Co.* v. *Sav-On-Drugs,* 366 U. S. 276, 278–289; see also *id.,* at 288, 289–292 (DOUGLAS, J., dissenting). Appellee would characterize these California statutes as primarily of a regulatory nature, invoking *Robertson* v. *California,* 328 U. S. 440, in which the majority of the Court held that a State might exclude an interstate insurance company which failed to meet certain minimum reserve requirements designed to assure that the insurer is financially solvent.

But here California exacts a $200 annual fee as a condition of obtaining and maintaining a license. As we recognized in *Murdock* v. *Pennsylvania,* 319 U. S. 105, 112: "The power to tax the exercise of a privilege is the power to control or suppress its enjoyment." The California District Court of Appeal viewed the fee as one designed to offset the expenses of administering the licensing system itself. From California's characterization of the fee* it is not one to "defray the cost of *purely*

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*"The charges or expenses imposed by the licensing procedure are no larger in amount than is reasonably necessary to defray the admin-

local regulations" which we indicated was permissible in *Murdock,* 319 U. S., at 114, n. 8. (Emphasis added.)

Because I believe that this case presents substantial and important constitutional questions, I would note probable jurisdiction and set this case down for argument.

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istrative expenses involved . . . ." *California* v. *Fairfax Family Fund,* 235 Cal. App. 2d 881, 884, 47 Cal. Rptr. 812, 814.

WMCA, INC., ET AL. *v.* LOMENZO, SECRETARY OF STATE OF NEW YORK, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 85. Decided October 11, 1965.

238 F. Supp. 916, affirmed.

Leo A. Larkin, Jack B. Weinstein, Leonard B. Sand, Max Gross, Morris Handel and *George H. P. Dwight* for appellants.

Louis J. Lefkowitz, Attorney General of New York, *Thomas E. Dewey, Leonard Joseph* and *Malcolm H. Bell* for appellees.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.

MR. JUSTICE FORTAS took no part in the consideration or decision of this case.

MR. JUSTICE HARLAN, concurring.*

The Court today disposes summarily of four New York reapportionment cases; it retains jurisdiction of a fifth, *Lomenzo* v. *WMCA, Inc.,* No. 81, which raises substantial questions similar to some of those involved in a set of Hawaii reapportionment cases, *Burns* v. *Richardson,* No. 318; *Cravalho* v. *Richardson,* No. 323; and *Abe* v. *Richardson,* No. 409, with respect to which probable

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*[This opinion applies also to No. 191, *Travia et al.* v. *Lomenzo, Secretary of State of New York, et al.;* No. 319, *Rockefeller, Governor of New York, et al.* v. *Orans et al.;* and No. 449, *Screvane, President of City Council of City of New York, et al.* v. *Lomenzo, Secretary of State of New York, et al.*]

jurisdiction has been noted (*post*, p. 807). Because these cryptic dispositions risk bewildering the New York legislators and courts, let alone those of other States, I believe it fitting to elucidate my understanding of these dispositions, all of which I join on the premises herein indicated. The need for clarification is particularly desirable because, through dismissal of the appeal in *Rockefeller* v. *Orans,* No. 319, and affirmance in *WMCA, Inc.* v. *Lomenzo,* No. 85, this Court signifies its approval of two decisions concerning the same apportionment plan, one of which (No. 85) found it acceptable and the other of which (No. 319) struck it down.

The New York Legislature adopted an apportionment plan, known as "Plan A,"[1] to comply with an order of a three-judge District Court, dated July 27, 1964, requiring the State to enact "a valid apportionment scheme that is in compliance with the XIV Amendment of the United States Constitution and which shall be implemented so as to effect the election of Members of the Legislature at the election in November, 1965, Members so elected to hold office for a term of one year ending December 31, 1966 . . . ."[2]

In *WMCA, Inc.* v. *Lomenzo,* 238 F. Supp. 916, the three-judge court found that Plan A satisfied this order;

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[1] New York Laws 1964, c. 976. The New York Legislature passed three successive amendments to c. 976: New York Laws 1964, cc. 977-978 ("Plan B"), c. 979 ("Plan C"), and c. 981 ("Plan D"). The District Court in the same opinion that found Plan A constitutional, *WMCA, Inc.* v. *Lomenzo,* 238 F. Supp. 916, also held that Plans B, C, and D did not meet the requirements of the Fourteenth Amendment, as interpreted in *Reynolds* v. *Sims,* 377 U. S. 533, and *WMCA, Inc.* v. *Lomenzo,* 377 U. S. 633. This Court is retaining jurisdiction in the appeal from those determinations, *Lomenzo* v. *WMCA, Inc.,* No. 81.

[2] Civil No. 61-1559, U. S. D. C. S. D. N. Y. The order of the District Court was affirmed summarily by this Court, *Hughes* v. *WMCA, Inc.,* 379 U. S. 694, MR. JUSTICE CLARK and I dissenting.

in so doing it rejected contentions that apportioning on a basis of *citizen* population violates the Federal Constitution, and that partisan "gerrymandering" may be subject to federal constitutional attack under the Fourteenth Amendment. In affirming this decision, this Court necessarily affirms these two eminently correct principles.

Quite evidently Plan A was seen by the District Court, and is also viewed by this Court, as but a temporary measure. In holding the plan federally acceptable for the purpose of electing a special 1966 Legislature, the District Court explicitly abstained from dealing with challenges to the plan under the State Constitution. Judge Waterman also noted that although Plan A met federal constitutional requirements, "Of course, the ultimate fitness of the scheme for their needs and purposes is for the people of the State of New York, themselves, to decide, and not for this court to mandate." 238 F. Supp., at 927.

Subsequent to the decision below in *WMCA,* the New York Court of Appeals held Plan A (as well as Plans B, C, and D) unconstitutional as a matter of state law.[3] In now dismissing for lack of a substantial federal question the appeal from that decision (*Rockefeller* v. *Orans,* No. 319) insofar as it may bear upon any apportionment plan effective after the expiration of the 1966 New York Legislature, I take it that the Court is asserting that any final apportionment plan must comport with state as well as federal constitutional requirements.[4] So much of the disposition in No. 319 I join without reservation. In dismissing, without more, the remaining part of that appeal, I take it that the Court is simply reflecting its affirmances in Nos. 191 and 449 (*post,* pp. 9, 11), whereby it puts its stamp of approval on the District Court's use of Plan A, though invalid under the New York Constitution, as a temporary measure. I acquiesce in this aspect of the disposition because of factors to which I advert below.

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[3] *In re Orans,* 15 N. Y. 2d 339, 206 N. E. 2d 854. The Court of Appeals held Plans A, B, C, and D invalid under Art. III, § 2, of the New York Constitution which states, "The assembly shall consist of one hundred and fifty members." All four plans provided for larger assemblies: Plan A, 165 assemblymen, c. 976, § 301; Plan B, 180 assemblymen, c. 977, § 301; Plan C, 186 assemblymen (having a total of 165 votes), c. 979, § 301; Plan D, 174 assemblymen (having a total of 150 votes), c. 981, § 301.

The Court affirms as well two appeals, *Travia* v. *Lomenzo,* No. 191, and *Screvane* v. *Lomenzo,* No. 449, from the District Court's order of May 24, 1965, which specifically ordered a November 1965 special election under Plan A after the New York Court of Appeals had already declared that plan to be in violation of the State Constitution.[5] On June 1, 1965, this Court denied a motion to stay the order and to accelerate the appeal, *Travia* v. *Lomenzo,* 381 U. S. 431. In dissent I noted that a federal court order that a state election be held under a plan declared invalid under the State Constitution by the highest court of that State surely presented issues of far-reaching importance for the smooth functioning of our federal system, which were deserving of plenary consideration by this Court. I would have accelerated the appeal, and but for the action of this Court in denying the stay which was sought I would have granted the further application for such a stay that was made to me during the summer. *Travia* v. *Lomenzo*, No. 191, Memorandum of MR. JUSTICE HARLAN, July 16, 1965, 86 S. Ct. 7. I now acquiesce in the affirmance[6] as I can see no satisfactory way to heal, at this juncture, the wounds to federal-state relations caused by the District Court's order without inflicting even greater ones.

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[4] The Court's dismissal of this part of the appeal in No. 319 necessarily approves the Court of Appeals' holding that from the standpoint of federal law the 150-member requirement of the New York Constitution was not an integral part of the apportionment scheme invalidated in *WMCA, Inc.* v. *Lomenzo,* 377 U. S. 633.

[5] The May 24, 1965, order of the District Court was in oral form. A written opinion was handed down on July 13, 1965, Civil No. 61-1559, embodying the May order.

The upshot of what is done today is, then, to suspend New York's 150-member constitutional provision for the one-year duration of the 1966 Legislature, a result to which I subscribe only under the compulsion of what has gone before in this Court.

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[6] A decision on the merits by this Court is unavoidable. The appeal from the three-judge District Court is brought here under 28 U. S. C. § 1253 (1964 ed.), and I do not believe this case, or *a fortiori* any of the other New York reapportionment cases presently before the Court, is moot. Surely if this Court now held that the District Court erred in ordering the election under Plan A, it has the power, for example, to enjoin the November 2 election and to order the District Court to arrange for yet another election and for other appropriate temporary reapportionment relief. The very great difficulties implicit in affording any such relief at this late stage go to the question of its desirability, not to the mootness of the underlying action.

TRAVIA ET AL. *v.* LOMENZO, SECRETARY OF STATE OF NEW YORK, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 191. Decided October 11, 1965.

Affirmed.

Simon H. Rifkind and *Edward N. Costikyan* for appellants.

Louis J. Lefkowitz, Attorney General of New York, *Daniel M. Cohen,* Assistant Solicitor General, *Donald Zimmerman,* Special Assistant Attorney General, *George D. Zuckerman,* Assistant Attorney General, and *Willis Burton Lemon* for appellees.

PER CURIAM.

The motion to dispense with printing the jurisdictional statement is granted.

The motions to affirm are granted and the judgment is affirmed.

MR. JUSTICE FORTAS took no part in the consideration or decision of this case.

[For concurring opinion of MR. JUSTICE HARLAN, see No. 85, *WMCA, Inc., et al.* v. *Lomenzo, Secretary of State of New York, et al., ante,* p. 4.]

ROCKEFELLER, GOVERNOR OF NEW YORK, ET AL. *v.* ORANS ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 319. Decided October 11, 1965.

15 N. Y. 2d 339, 206 N. E. 2d 854, appeal dismissed.

Louis J. Lefkowitz, Attorney General of New York, *Thomas E. Dewey, Leonard Joseph* and *Malcolm H. Bell* for appellants.

Justin N. Feldman for appellee Orans.

PER CURIAM.

On April 14, 1965, the New York Court of Appeals ruled that the New York Laws of 1964, cc. 976, 977, 978, 979, 981, were invalid under the New York Constitution, Art. III, § 2. On July 13, 1965, the United States District Court for the Southern District of New York enjoined interference with an election of members of the New York Legislature to be held on November 2, 1965, based on "the scheme set forth" in the New York Laws of 1964, c. 976. Insofar as the decision of the Court of Appeals has been superseded by the order of the District Court, the appeal is dismissed. In all other respects, the appeal is dismissed for want of a substantial federal question.

MR. JUSTICE FORTAS took no part in the consideration or decision of this case.

[For concurring opinion of MR. JUSTICE HARLAN, see No. 85, *WMCA, Inc., et al.* v. *Lomenzo, Secretary of State of New York, et al., ante,* p. 4.]

SCREVANE, PRESIDENT OF CITY COUNCIL OF CITY OF NEW YORK, ET AL. *v.* LOMENZO, SECRETARY OF STATE OF NEW YORK, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 449. Decided October 11, 1965.

Affirmed.

Leo A. Larkin, Morris Handel and *George H. P. Dwight* for appellants.

Louis J. Lefkowitz, Attorney General of New York, *Daniel M. Cohen,* Assistant Solicitor General, *Donald Zimmerman,* Special Assistant Attorney General, *George D. Zuckerman,* Assistant Attorney General, *Leonard B. Sand* and *Max Gross* for appellees.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.

MR. JUSTICE FORTAS took no part in the consideration or decision of this case.

[For concurring opinion of MR. JUSTICE HARLAN, see No. 85, *WMCA, Inc., et al.* v. *Lomenzo, Secretary of State of New York, et al., ante,* p. 4.]

JOBE ET AL. *v.* CITY OF ERLANGER.

APPEAL FROM THE COURT OF APPEALS OF KENTUCKY.

No. 62. Decided October 11, 1965.

383 S. W. 2d 675, appeal dismissed.

James C. Ware for appellants.

Harry L. Riggs, Jr., for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

MR. JUSTICE HARLAN is of the opinion that probable jurisdiction should be noted.

ALUMINUM CO. OF AMERICA ET AL. *v.* UNITED STATES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI.

No. 84. Decided October 11, 1965.

233 F. Supp. 718; 247 F. Supp. 308, affirmed.

Herbert A. Bergson, Howard Adler, Jr., Daniel H. Margolis and *William K. Unverzagt* for appellants.

Solicitor General Cox, Acting Assistant Attorney General Wright, Lionel Kestenbaum, Jerry Z. Pruzansky and *Edna Lingreen* for the United States.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.

HERALD PUBLISHING CO. *v.* WHITEHEAD-DONOVAN CORP.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 156. Decided October 11, 1965.

62 Cal. 2d 185, 397 P. 2d 426, appeal dismissed.

James G. Butler for appellant.

George G. Shapitric for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

MR. JUSTICE HARLAN is of the opinion that probable jurisdiction should be noted.

BOWMAN *v.* LAKE COUNTY PUBLIC BUILDING COMMISSION ET AL.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

No. 170. Decided October 11, 1965.

31 Ill. 2d 575, 203 N. E. 2d 129, appeal dismissed and certiorari denied.

Paul E. Hamer for appellant.

Andrew A. Semmelman and *Bruno W. Stanczak* for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

PURE-VAC DAIRY PRODUCTS CORP. *v.* MISSISSIPPI EX REL. PATTERSON, ATTORNEY GENERAL.

APPEAL FROM THE SUPREME COURT OF MISSISSIPPI.

No. 179. Decided October 11, 1965.

251 Miss. 457, 170 So. 2d 274, appeal dismissed.

George E. Morrow for appellant.

Joe T. Patterson, Attorney General of Mississippi, and *John L. Hatcher,* Special Assistant Attorney General, for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

FILISTER ET AL. *v.* CITY OF MINNEAPOLIS ET AL.

APPEAL FROM THE SUPREME COURT OF MINNESOTA.

No. 184. Decided October 11, 1965.

270 Minn. 53, 133 N. W. 2d 500, appeal dismissed and certiorari denied.

Josiah E. Brill for appellants.

Arvid Falk and *Kenneth W. Green* for appellees.

PER CURIAM.

The motion to substitute Katherine E. Bliss in place of J. J. Bliss as a party appellant is granted.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

GRIFFING ET AL., CONSTITUTING BOARD OF SUPERVISORS OF SUFFOLK COUNTY, NEW YORK v. BIANCHI ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK.

No. 206. Decided October 11, 1965.

238 F. Supp. 997, appeal dismissed.

Stanley S. Corwin, Joseph L. Nellis and *Allen A. Sperling* for appellants.

Richard C. Cahn for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction.

JONES ET AL. v. McFADDIN ET AL.

APPEAL FROM THE COURT OF CIVIL APPEALS OF TEXAS, SIXTH SUPREME JUDICIAL DISTRICT.

No. 226. Decided October 11, 1965.

382 S. W. 2d 277, appeal dismissed.

William Blum, Jr., for appellants.

George A. Weller, Ewell Strong and *Major T. Bell* for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

MR. JUSTICE BLACK took no part in the consideration or decision of this case.

BERRY *v.* STATE TAX COMMISSION.

APPEAL FROM THE SUPREME COURT OF OREGON.

No. 229. Decided October 11, 1965.

241 Ore. 580, 397 P. 2d 780, 399 P. 2d 164, appeal dismissed.

Robert N. Gygi for appellant.

Robert Y. Thornton, Attorney General of Oregon, and *John C. Mull* and *Carlisle B. Roberts,* Assistant Attorneys General, for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

MR. JUSTICE HARLAN is of the opinion that probable jurisdiction should be noted.

SEACAT MARINE DRILLING CO. ET AL. *v.* BABINEAUX.

APPEAL FROM THE COURT OF APPEAL OF LOUISIANA, THIRD CIRCUIT.

No. 283. Decided October 11, 1965.

170 So. 2d 518, appeal dismissed.

Marian Mayer Berkett for appellants.

PER CURIAM.

The appeal is dismissed for want of a substantial federal question.

MR. JUSTICE HARLAN is of the opinion that the appeal should be dismissed for want of jurisdiction.

UNITED STATES *v.* NEW ORLEANS CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA.

No. 119. Decided October 11, 1965.

238 F. Supp. 273, reversed.

Solicitor General Cox, Assistant Attorney General Orrick, Robert B. Hummel and *Gerald Kadish* for the United States.

R. Emmett Kerrigan, George W. Wise and *Joseph J. Smith, Jr.,* for appellees.

PER CURIAM.

The judgment is reversed. *Times-Picayune Publishing Co.* v. *United States,* 345 U. S. 594, at 623–624; *United States* v. *Socony-Vacuum Oil Co., Inc.,* 310 U. S. 150, at 226.

HOURIHAN *v.* MAHONEY.

APPEAL FROM THE SUPREME JUDICIAL COURT OF MAINE.

No. 342, Misc. Decided October 11, 1965.

Appeal dismissed and certiorari denied.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

MADDOX *v.* WILLIS ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA.

No. 308. Decided October 11, 1965.

Appeal dismissed.

William G. McRae for appellant.

Jack Greenberg, James M. Nabrit III and *Michael Meltsner* for appellees Willis et al. *Acting Solicitor General Spritzer, Assistant Attorney General Doar* and *Harold H. Greene* for appellee Katzenbach.

PER CURIAM.

The motions to dismiss are granted and the appeal is dismissed for want of jurisdiction.

EL PASO ELECTRIC CO. *v.* CALVERT ET AL.

APPEAL FROM THE COURT OF CIVIL APPEALS OF TEXAS, THIRD SUPREME JUDICIAL DISTRICT.

No. 395. Decided October 11, 1965.

385 S. W. 2d 542, appeal dismissed.

William Duncan for appellant.

Waggoner Carr, Attorney General of Texas, *Hawthorne Phillips,* First Assistant Attorney General, *T. B. Wright,* Executive Assistant Attorney General, and *Gordon C. Cass* and *H. Grady Chandler,* Assistant Attorneys General, for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

ALAMO EXPRESS, INC., ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS.

No. 357. Decided October 11, 1965.

239 F. Supp. 694, affirmed.

Reagan Sayers and *Ewell H. Muse, Jr.*, for appellants.

Acting Solicitor General Spritzer, Assistant Attorney General Turner, Lionel Kestenbaum, Robert W. Ginnane and *Arthur J. Cerra* for the United States et al. *William E. Cureton* for appellees Central Freight Lines, Inc., et al.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.

O'CONNOR *v.* OHIO.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 281, Misc. Decided October 11, 1965.

Appeal dismissed and certiorari denied.

James W. Cowell for appellant.

Harry Friberg for appellee.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

PRICE, DBA HOWARD PRICE & CO. *v.* STATE ROAD COMMISSION OF WEST VIRGINIA ET AL.

APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA.

No. 144. Decided October 11, 1965.

Appeal dismissed.

Carney M. Layne and *Charles W. Yeager* for appellant.

C. Donald Robertson, Attorney General of West Virginia, and *Philip J. Graziani* and *C. Robert Sarver,* Assistant Attorneys General, for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed in light of the representations of the Attorney General of West Virginia that there is open to the appellant an effective state procedure of which he has not availed himself.

PUGACH *v.* NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 12, Misc. Decided October 11, 1965.

15 N. Y. 2d 65, 204 N. E. 2d 176, appeal dismissed and certiorari denied.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

BRAADT *v.* CITY OF NEW YORK, DEPARTMENT OF SANITATION, ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 358. Decided October 11, 1965.

15 N. Y. 2d 875, 206 N. E. 2d 349, appeal dismissed and certiorari denied.

William Gitnick for appellant.

Louis J. Lefkowitz, Attorney General of New York, *Paxton Blair,* Solicitor General, and *Jean M. Coon,* Assistant Attorney General, for New York State Workmen's Compensation Board, and *Leo A. Larkin, Seymour B. Quel* and *Benjamin Offner* for City of New York, appellees.

PER CURIAM.

The motions to dismiss are granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

CASSESE *v.* PEYTON, PENITENTIARY SUPERINTENDENT.

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 137, Misc. Decided October 11, 1965.

Appeal dismissed and certiorari denied.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

MALLORY ET AL. *v.* NORTH CAROLINA.

APPEAL FROM THE SUPREME COURT OF NORTH CAROLINA.

No. 81, Misc. Decided October 11, 1965.

263 N. C. 536, 139 S. E. 2d 870, appeal dismissed and certiorari denied.

Walter S. Haffner for appellants.

T. W. Bruton, Attorney General of North Carolina, and *Ralph Moody,* Deputy Attorney General, for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

KADANS *v.* DICKERSON ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA.

No. 399, Misc. Decided October 11, 1965.

Appeal dismissed.

Joseph M. Kadans, appellant, *pro se.*

Paul C. Parraguirre for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction.

GRANIERI *v.* SALT LAKE CITY.

APPEAL FROM THE SUPREME COURT OF UTAH.

No. 202, Misc. Decided October 11, 1965.

Appeal dismissed and certiorari denied.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

KASHARIAN *v.* HALPERN ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

No. 389, Misc. Decided October 11, 1965.

Appeal dismissed.

PER CURIAM.

The appeal is dismissed for want of jurisdiction.

THOMPSON *v.* CITY AND STATE OF NEW YORK.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 248, Misc. Decided October 11, 1965.

Appeal dismissed and certiorari denied.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

GONDECK *v.* PAN AMERICAN WORLD AIRWAYS, INC., ET AL.

ON MOTION FOR LEAVE TO FILE SECOND PETITION FOR REHEARING.

No. 919, October Term, 1961. Certiorari denied June 11, 1962.—Rehearing denied October 8, 1962.—Rehearing and certiorari granted and case decided October 18, 1965.

Petitioner's husband while off duty was killed outside an overseas defense base where he was employed. The Deputy Commissioner, Bureau of Employees' Compensation, Department of Labor, having found that at the time of the accident decedent was subject to emergency call and was returning from reasonable recreation, awarded petitioner death benefits under the Longshoremen's and Harbor Workers' Compensation Act. The District Court set the award aside and the Court of Appeals affirmed, finding no benefit to the employer in decedent's trip and no relation between the accident and his employment. This Court denied certiorari in the October 1961 Term and a petition for rehearing the next Term. Thereafter another Court of Appeals upheld an award arising from another employee's death in the same accident, relying on *O'Leary* v. *Brown-Pacific-Maxon, Inc.,* 340 U. S. 504, which held that the Deputy Commissioner's award under the Act may be based on his finding that the obligations and conditions of employment create the "zone of special danger" out of which the injury or death arose. The Court of Appeals which decided this case expressed doubt in a subsequent case that its decision below conformed to *Brown-Pacific-Maxon,* and noted that but for a *per curiam* judgment (reversed last Term in *O'Keeffe* v. *Smith, Hinchman & Grylls Associates, Inc.,* 380 U. S. 359) the *Gondeck* case stood alone. *Held:* Since the Court of Appeals misinterpreted the standard in *Brown-Pacific-Maxon* and since of those eligible petitioner alone had not received compensation for the accident here involved, the "interests of justice would make unfair the strict application of [the Court's] rules" by which the litigation here would otherwise be final. *United States* v. *Ohio Power Co.,* 353 U. S. 98, 99.

Rehearing and certiorari granted; 299 F. 2d 74, reversed.

Arthur Roth for petitioner.

Leo M. Alpert for respondents.

Per Curiam.

Petitioner's husband, Frank J. Gondeck, was killed as a result of a jeep accident on San Salvador Island outside a defense base at which he was employed. The accident took place in the evening as Gondeck and four others were returning from a nearby town. The Deputy Commissioner of the Bureau of Employees' Compensation, United States Department of Labor, awarded death benefits to petitioner in accordance with the terms of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U. S. C. § 901 *et seq.* (1958 ed.), as extended by the Defense Base Act, 55 Stat. 622, as amended, 42 U. S. C. § 1651 *et seq.* (1958 ed.). In support of the award, the Deputy Commissioner found, among other things, that, although Gondeck had completed his day's work, he was subject to call for emergencies while off duty and was returning from reasonable recreation when the accident occurred. The District Court set aside the Deputy Commissioner's order, and the Court of Appeals for the Fifth Circuit affirmed. *United States* v. *Pan American World Airways, Inc.*, 299 F. 2d 74. The Court of Appeals acknowledged that Gondeck was subject to call, *id.*, at 75, but found no benefit to the employer in Gondeck's trip, and "no evidence that furnishes a link by which the activity in which Gondeck was engaged was related to his employment." *Id.*, at 77.

On June 11, 1962, we denied certiorari. 370 U. S. 918. On October 8, 1962, we denied a petition for rehearing. 371 U. S. 856. We are now apprised, however, of "intervening circumstances of substantial . . . effect,"* justifying application of the established doctrine that "the interest in finality of litigation must yield where the interests of justice would make unfair the strict application of our rules." *United States* v. *Ohio Power Co.,* 353 U. S. 98, 99. Subsequent to our orders in the present case, the Court of Appeals for the Fourth Circuit upheld an award to the survivors of another employee killed in the same accident. *Pan American World Airways, Inc.* v. *O'Hearne,* 335 F. 2d 70. In upholding the award, the court cited our decision in *O'Leary* v. *Brown-Pacific-Maxon, Inc.,* 340 U. S. 504. In a subsequent case the Court of Appeals for the Fifth Circuit itself expressed doubt whether its decision in the present case had been consistent with *Brown-Pacific-Maxon. O'Keeffe* v. *Pan American World Airways,* 338 F. 2d 319, 325. The court also noted that, "The Gondeck case stands alone, except for a per curiam opinion." *Id.,* at 325. This Court reversed that *per curiam* judgment last Term, *O'Keeffe* v. *Smith, Hinchman & Grylls Associates, Inc.,* 380 U. S. 359, so that the present case now stands completely alone.

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*U. S. Supreme Ct. Rule 58 (2).

In *O'Keeffe* we made clear that the determinations of the Deputy Commissioner are subject only to limited judicial review, and we reaffirmed the *Brown-Pacific-Maxon* holding that the Deputy Commissioner need not find a causal relation between the nature of the victim's employment and the accident, nor that the victim was engaged in activity of benefit to the employer at the time of his injury or death. No more is required than that the obligations or conditions of employment create the "zone of special danger" out of which the injury or death arose. Since the Court of Appeals for the Fifth Circuit misinterpreted the *Brown-Pacific-Maxon* standard in this case, and since, of those eligible for compensation from the accident, this petitioner stands alone in not receiving it, "the interests of justice would make unfair the strict application of our rules." *United States* v. *Ohio Power Co., supra,* at 99.

We therefore grant the motion for leave to file the petition for rehearing, grant the petition for rehearing, vacate the order denying certiorari, grant the petition for certiorari, and reverse the judgment of the Court of Appeals.

It is so ordered.

MR. JUSTICE FORTAS took no part in the consideration or decision of this case.

MR. JUSTICE CLARK, joining in the judgment.

I fully agree with my Brother HARLAN "that litigation must at some point come to an end" and "that this decision holds seeds of mischief for the future orderly administration of justice . . . ." But with *Cahill* v. *New York, N. H. & H. R. Co.,* 351 U. S. 183 (1956), on our books, no other conclusion can be reached.

Up until *Cahill* I thought that successive petitions for rehearing would not be received by the Court under its Rule 58 (4).[1] This rule took the place of the old "end of Term" rule of *Bronson* v. *Schulten,* 104 U. S. 410, 415 (1882), abolished by the Congress in 1948, 28 U. S. C. § 452 (1958 ed.). Indeed, I doubted that the Court had the power to grant a successive petition for rehearing under a factual situation, as here, where a petition for certiorari had been denied over three years ago, 370 U. S. 918 (1962); a petition for rehearing had been denied, 371 U. S. 856 (1962); the mandate had issued more than three years before; and where petitioner had, about the same date, cancelled her appeal bond and been discharged of all liability thereunder. In *Cahill,* however, the Court through the device of a "motion to recall and amend the judgment" permitted a successive petition not only to be received but granted, despite the fact that the judgment thereby reopened had been previously paid.[2] This paved the way for the grant of a successive petition for rehearing in *United States* v. *Ohio Power Co.,* 353 U. S. 98 (1957), to make its judgment conform with this Court's decision that same Term in *United States* v. *Allen-Bradley Co.,* 352 U. S. 306 (1957), a companion case of *Ohio Power* in the Court of Claims.

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[1] "Consecutive petitions for rehearings, and petitions for rehearing that are out of time under this rule, will not be received."

The vice, of course, is the granting of successive petitions for rehearing in violation of Rule 58 (4), which was done for the first time in *Cahill.* It makes no difference that the rejection of finality be to correct alleged errors of our own or those below. Nor does it matter that the errors be corrected in the same Term, as in *Cahill,* or four Terms later, as here. In each instance the action violates Rule 58 (4) and that is the basis of my position.

I, too, as my Brother HARLAN said in *Ohio Power,* "can think of nothing more unsettling to lawyers and litigants, and more disturbing to their confidence in the evenhandedness of the Court's processes, than to be left in . . . uncertainty . . . as to when their cases may be considered finally closed in this Court." At p. 111 (dissenting opinion). However, *Cahill* opened up this practice. It may be that *Ohio Power* and the present case are more objectionable on their facts, but they merely condone *Cahill's* original vice. Until we can gain the vote of the majority to the contrary we are stuck with the practice. The outlook for this appears dim. We can only hope that this rule of "no finality," which the Court varnishes with the charms of reason, will be sparingly used, or overruled by Congress, as was the "end of Term" rule. I, therefore, join in the judgment of the Court.

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[2] MR. JUSTICE BLACK, joined by THE CHIEF JUSTICE, MR. JUSTICE DOUGLAS and myself, dissented.

MR. JUSTICE HARLAN, dissenting.

The result reached in this case has been achieved at the expense of the sound legal principle that litigation must at some point come to an end.

I can find nothing in the train of events on which the Court relies in overturning this more than three-year-old final judgment that justifies bringing into play the dubious doctrine of *United States* v. *Ohio Power Co.*, 353 U. S. 98, a case which was decided by a closely divided vote of less than a full bench,[1] which deviated from long-established practices of this Court,[2] and which, so far as I can find, has had no sequel in subsequent decisions of the Court.[3]

The judgment against this petitioner became final as long ago as June 11, 1962. 370 U. S. 918. The Court refused to reconsider it four months later when it denied rehearing on October 8, 1962. 371 U. S. 856. When some two years later, July 13, 1964, the Court of Appeals for the Fourth Circuit upheld a compensation award with respect to a co-employee of Gondeck killed in the *same* accident, *Pan American World Airways, Inc.* v. *O'Hearne*, 335 F. 2d 70, petitioner did not even seek to file another petition for rehearing here. A few months later the Fifth Circuit might be thought to have indicated some doubt about its earlier decision in the *Gondeck* case, *O'Keeffe* v. *Pan American World Airways, Inc.*, 338 F. 2d 319, 325, but again no attempt was made to file a further petition for rehearing here in *Gondeck.*

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[1] The vote was 4 to 3, MR. JUSTICE BRENNAN and Mr. Justice Whittaker, since retired, not participating. 353 U. S., at 99.

[2] See dissenting opinion of HARLAN, J., 353 U. S., at 99.

[3] My Brother CLARK's citation of *Cahill* v. *New York, N. H. & H. R. Co.*, 351 U. S. 183, *ante*, p. 28, for the proposition that this petition for rehearing must be granted is inapposite. *Cahill* was an FELA case in which this Court reversed summarily a judgment of the Court of Appeals overturning a district court judgment for the plaintiff, 350 U. S. 898. Later that same Term, after a petition for rehearing had been denied, 350 U. S. 943, the Court was persuaded on "a

It was this Court's decision of last Term in *O'Keeffe* v. *Smith, Hinchman & Grylls Associates, Inc.,* 380 U. S. 359, which itself was a debatable innovation in this area of the law,[4] that triggered the undoing of this judgment of four Terms ago. It should be noted that the subject matter in *O'Keeffe* v. *Pan American World Airways, Inc.,* was an entirely *different* accident from the one in which petitioner's decedent was involved.

This, then, is hardly one of those rare cases in which " 'the interest in finality of litigation must yield' " because " 'the interests of justice would make unfair the strict application of our rules,' " *ante,* pp. 26–27. On the contrary, the situation is one in which the prevailing party in this litigation had every reason to count on the judgment in its favor remaining firm. Believing that this decision holds seeds of mischief for the future orderly administration of justice, I respectfully dissent.

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motion to recall and amend the judgment" that its mandate, which simply reinstated the District Court's judgment, was incorrect and that the case should properly have been remanded to the Court of Appeals for further proceedings. It is difficult for me to see how the correction during the same Term of our own error in *Cahill* can be thought to compel or justify a general "rule of 'no finality' " (as my Brother CLARK puts it, *ante,* p. 29) which requires the granting of a second petition for rehearing three years after the first one was denied in a case which this Court never heard.

[4] The case was decided without argument by a substantially divided Court, 380 U. S. 359. See dissenting opinion of HARLAN, J., joined by CLARK and WHITE, JJ., 380 U. S., at 365. See also separate opinion of DOUGLAS, J., 380 U. S., at 371.

JONES & LAUGHLIN STEEL CORP. *v.* GRIDIRON STEEL CO.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 123. Decided October 18, 1965.

Fed. Rule Civ. Proc. 6 (a) extending time limit that would otherwise expire on a Saturday, Sunday, or legal holiday to the end of next day not in that category *held* not inapplicable on ground that Court of Appeals had directed District Court Clerk's office to remain open Saturday mornings.

Certiorari granted and case remanded.

Walter J. Blenko, Walter J. Blenko, Jr., and *Richard F. Stevens* for petitioner.

Robert J. Fay for respondent.

PER CURIAM.

The petition for writ of certiorari to the Court of Appeals for the Sixth Circuit is granted, and the judgment dismissing petitioner's appeal to that court is reversed. The time limited by 28 U. S. C. § 2107 and Fed. Rule Civ. Proc. 73 for the filing of the notice of appeal from the judgment appealed from was 30 days. However, Fed. Rule Civ. Proc. 6 (a), as amended, provides that in computing the period, "[t]he last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday." Since the thirtieth day following entry of the judgment appealed from was Saturday and the notice of appeal was filed the following Monday, we hold that the filing of the notice of appeal was timely. The provision of Rule 6 (a) was not made inapplicable by the order of the Court of Appeals directing that the District Court Clerk's offices be open for business on Saturday mornings. The case is remanded to the Court of Appeals for further proceedings consistent with this opinion.

It is so ordered.

FIRST SECURITY NATIONAL BANK & TRUST CO. OF LEXINGTON ET AL. *v.* UNITED STATES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY.

No. 141. Decided October 18, 1965.

This Court held that the bank merger resulting in appellant bank's formation violated the Sherman Act and remanded the case to the District Court "for further proceedings in conformity with the opinion of this Court." (376 U. S. 665.) After several postponements of the date set by the District Court for reporting progress "in complying with the mandate of the Supreme Court," the parties presented a proposed interlocutory decree providing for submission of a detailed divestiture plan in six months. The District Court thereupon held appellant bank and its officers in contempt for failure to comply with this Court's mandate. *Held:* Since divestiture was not ordered within any specific period, appellants did not violate this Court's judgment.

Reversed.

Paul A. Porter and *Victor H. Kramer* for appellants.

Solicitor General Cox, Assistant Attorney General Turner and *Lionel Kestenbaum* for the United States.

PER CURIAM.

In *United States* v. *First National Bank,* 376 U. S. 665, this Court held that the merger of First National Bank and Trust Co. of Lexington, Kentucky, with Security Trust Co. of Lexington to form First Security National Bank and Trust Co. violated § 1 of the Sherman Act, 26 Stat. 209, 15 U. S. C. § 1. The Court's judgment remanded the case to the District Court "for further proceedings in conformity with the opinion of this Court." Thereafter, on July 1, 1964, the District Court ordered the parties "to report to the court the progress made in complying with the judgment" of the Supreme Court. On application of the parties, the reporting date was thrice postponed to permit negotiations between First Security and the Government concerning an appropriate plan of divestiture. When, on the final date for reporting, February 16, 1965, the parties jointly presented only a proposed interlocutory decree providing that the detailed plan for divestiture would be submitted within six months, the District Court held First Security, its executive officers and directors in contempt. Although there is some indication that the District Court was dissatisfied with the compliance of the bank with the District Court's order of July 1, 1964, the contempt judgment itself was entered because the delay in submitting a final plan of divestiture was a failure "to comply with the mandate of the Supreme Court . . . ." The court imposed a fine of $100 per day until the contempt had been purged by "full compliance with the mandate of the Supreme Court."

The District Judge's interpretation of this Court's judgment was erroneous. We remanded the case for further proceedings in the District Court consistent with this Court's opinion. Neither the opinion nor the judgment of this Court expressly dealt with the matter of remedy and neither ordered divestiture within any particular period of time. Compare *United States* v. *El Paso Natural Gas Co.,* 376 U. S. 651, 662 (decided the same day as the prior appeal in this case and directing the District Court to order divestiture without delay). No order of divestiture was entered in the District Court until March 18, 1965, a month after the bank had been held in contempt. The District Court has the authority to require obedience and to punish disobedience of its lawful orders and decrees, 18 U. S. C. § 401, but this record reveals nothing the bank did or failed to do which violated the judgment of this Court. The judgment holding the bank, its executive officers and directors in contempt is

Reversed.

MR. JUSTICE FORTAS took no part in the consideration or decision of this case.

JAMES *v.* LOUISIANA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA.

No. 23, Misc. Decided October 18, 1965.

After petitioner's arrest, he was driven by police to his home, more than two blocks away, where an intensive search without a warrant yielded the narcotics and equipment which were the basis for his conviction for possession of narcotics. *Held:* The search was not incident to the arrest which occurred more than two blocks away and it was constitutional error to admit the fruits of the illegal search into evidence.

Certiorari granted; 246 La. 1033, 169 So. 2d 89, reversed and remanded.

G. Wray Gill, Sr., for petitioner.

Jack P. F. Gremillion, Attorney General of Louisiana, *M. E. Culligan,* Assistant Attorney General, and *Jim Garrison* for respondent.

PER CURIAM.

The petitioner was convicted by a Louisiana jury of possession of narcotics and was sentenced to imprisonment for 10 years. The Supreme Court of Louisiana set aside the conviction on the ground that it was based upon evidence seized without a warrant during an illegal search. 246 La. 1033, 169 So. 2d 89. Upon rehearing, however, that court affirmed the conviction by a divided vote. 246 La. 1053, 169 So. 2d 97. We grant the motion to proceed *in forma pauperis* and the petition for certiorari and reverse the judgment.

Police officers arrested the petitioner near the intersection of Camp Street and Jackson Avenue in the City of New Orleans, after he had alighted from an automobile driven by another man. The officers then drove the petitioner to his home, more than two blocks away.

They broke open the door and for several hours conducted an intensive search which finally yielded the narcotics equipment and single morphine tablet that constituted the basis of the petitioner's subsequent conviction.

The Supreme Court of Louisiana found that the officers had probable cause to arrest the petitioner at the time they apprehended him, and the validity of his arrest is not here in issue. In the circumstances of this case, however, the subsequent search of the petitioner's home cannot be regarded as incident to his arrest on a street corner more than two blocks away. A search "can be incident to an arrest only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest." *Stoner* v. *California,* 376 U. S. 483, 486. See also *Preston* v. *United States,* 376 U. S. 364.

Under the doctrine of *Mapp* v. *Ohio,* 367 U. S. 643, see also *Ker* v. *California,* 374 U. S. 23, it was constitutional error to admit the fruits of this illegal search into evidence at the petitioner's trial. Accordingly, the petition for certiorari is granted, the judgment is reversed, and the case is remanded to the Supreme Court of Louisiana for further proceedings not inconsistent with this opinion.

It is so ordered.

METROMEDIA, INC. *v.* AMERICAN SOCIETY OF COMPOSERS, AUTHORS & PUBLISHERS ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 212. Decided October 18, 1965.

Appeal dismissed.

Robert A. Dreyer and *George A. Katz* for appellant.

Simon H. Rifkind, Herman Finkelstein and *Jay H. Topkis* for American Society of Composers, Authors & Publishers, and *Acting Solicitor General Spritzer, Assistant Attorney General Turner, Lionel Kestenbaum* and *I. Daniel Stewart, Jr.*, for the United States, appellees.

PER CURIAM.

The motions to dismiss are granted and the appeal is dismissed for want of jurisdiction.

KASHARIAN ET AL. *v.* METROPOLITAN LIFE INSURANCE CO. ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

No. 446, Misc. Decided October 18, 1965.

Appeal dismissed.

Appellants *pro se*.

Nicholas Conover English for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction.

WELLS ET AL. v. REYNOLDS ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA.

No. 258. Decided October 18, 1965.

238 F. Supp. 779, affirmed.

Jack Greenberg and *James M. Nabrit III* for appellants.

PER CURIAM.

The judgment is affirmed.

MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN and MR. JUSTICE FORTAS dissent.

SHAKESPEARE ET AL. v. CITY OF PASADENA.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 281. Decided October 18, 1965.

Appeal dismissed and certiorari denied.

Appellants *pro se*.

Allyn H. Barber for appellee.

PER CURIAM.

The motion to dispense with printing the jurisdictional statement is granted.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

NATIONAL TRAILER CONVOY, INC. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA.

No. 373. Decided October 18, 1965.

240 F. Supp. 286, affirmed.

Jack N. Hays and *Harold G. Hernly* for appellant.

Acting Solicitor General Spritzer, Assistant Attorney General Turner, Robert B. Hummel, Robert W. Ginnane and *Thomas H. Ploss* for the United States et al.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.

KASHARIAN ET AL. *v.* SOUTH PLAINFIELD BAPTIST CHURCH ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

No. 433, Misc. Decided October 18, 1965.

Appeal dismissed.

PER CURIAM.

The appeal is dismissed for want of jurisdiction.

STEBBINS *v.* MACY, CHAIRMAN, U. S. CIVIL SERVICE COMMISSION, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

No. 384. Decided October 18, 1965.

Appeal dismissed.

Appellant *pro se*.

Acting Solicitor General Spritzer for appellees.

PER CURIAM.

The appeal is dismissed for want of jurisdiction.

BURNETTE ET AL. *v.* DAVIS ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA.

No. 241. Decided October 25, 1965.*

245 F. Supp. 241, affirmed.

Aubrey R. Bowles, Jr., and *Aubrey R. Bowles III* for appellants in No. 241. *Samuel W. Tucker* and *Henry L. Marsh III* for appellants in No. 424.

Robert Y. Button, Attorney General of Virginia, *R. D. McIlwaine III,* Assistant Attorney General, *David J. Mays* and *Henry T. Wickham* for appellees.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.

MR. JUSTICE FORTAS took no part in the consideration or decision of these cases.

RATLEY *v.* CROUSE, WARDEN.

APPEAL FROM THE SUPREME COURT OF KANSAS.

No. 551, Misc. Decided October 25, 1965.

Appeal dismissed and certiorari denied.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

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*Together with No. 424, *Thornton et al.* v. *Davis et al.,* also on appeal from the same court.

SERVICE TRUCKING CO., INC. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND.

No. 422. Decided October 25, 1965.

239 F. Supp. 519, affirmed.

Francis W. McInerny and *Robert G. Miller* for appellant.

Solicitor General Marshall, Assistant Attorney General Turner, Robert B. Hummel, Robert W. Ginnane and *Betty Jo Christian* for the United States et al.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.

KELLER *v.* CALIFORNIA.

APPEAL FROM THE DISTRICT COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT.

No. 522, Misc. Decided October 25, 1965.

Appeal dismissed and certiorari denied.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

MORTON SALT CO. *v.* UNITED STATES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA.

No. 275. Decided October 25, 1965.*

Affirmed.

L. M. McBride and *John P. Ryan, Jr.*, for appellant in No. 275. *R. William Rogers* for appellant in No. 276.

Acting Solicitor General Spritzer, Assistant Attorney General Turner and *Robert B. Hummel* for the United States.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed. *United States* v. *National Association of Real Estate Boards*, 339 U. S. 485, 493, 494; *Interstate Circuit, Inc.* v. *United States*, 306 U. S. 208, 221–227; *American Tobacco Co.* v. *United States*, 328 U. S. 781, 809–810; *Theatre Enterprises* v. *Paramount Film Distributing Corp.*, 346 U. S. 537, 540–542.

MR. JUSTICE HARLAN is of the opinion that probable jurisdiction should be noted.

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*Together with No. 276, *Diamond Crystal Salt Co.* v. *United States*, also on appeal from the same court.

WETHERALL ET AL. *v.* STATE ROAD COMMISSION OF WEST VIRGINIA ET AL.

APPEAL FROM THE CIRCUIT COURT OF WEST VIRGINIA, KANAWHA COUNTY.

No. 428. Decided October 25, 1965.

Appeal dismissed.

Carney M. Layne and *Charles W. Yeager* for appellants.

C. Donald Robertson, Attorney General of West Virginia, *Philip J. Graziani,* Deputy Attorney General, and *C. Robert Sarver,* Assistant Attorney General, for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed. *Price, dba Howard Price & Co.* v. *State Road Commission of West Virginia, ante,* p. 20.

FEDERAL TRADE COMMISSION *v.* MARY CARTER PAINT CO. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 15. Argued October 21, 1965.—Decided November 8, 1965.

Respondent paint company had a practice of advertising that for every can of paint purchased the buyer would be given a "free" can of equal quality and quantity. The Federal Trade Commission (FTC) ordered the paint company to cease and desist from the practice as being deceptive under § 5 of the Federal Trade Commission Act since the paint company had no history of selling single cans of paint; it had been marketing two cans; and had misrepresented by allocating to one can what was in fact the price of two cans. The Court of Appeals set aside the FTC's order. *Held:* There was substantial evidence in the record to support the finding of the FTC; its conclusion that the practice was deceptive was not arbitrary and must be sustained. Pp. 46–49.

333 F. 2d 654, reversed and remanded.

Nathan Lewin argued the cause for petitioner. With him on the briefs were *Solicitor General Marshall, Ralph S. Spritzer, James McI. Henderson* and *Charles C. Moore, Jr.*

David W. Peck argued the cause and filed a brief for respondents.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Respondent Mary Carter Paint Company[1] manufactures and sells paint and related products. The Federal Trade Commission ordered respondent to cease and desist from the use of certain representations found by the Commission to be deceptive and in violation of § 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 52 Stat. 111, 15 U. S. C. § 45 (1964 ed.). 60 F. T. C. 1830, 1845. The representations appeared in advertisements which stated in various ways that for every can of respondent's paint purchased by a buyer, the respondent would give the buyer a "free" can of equal quality and quantity. The Court of Appeals for the Fifth Circuit set aside the Commission's order. 333 F. 2d 654. We granted certiorari, 379 U. S. 957. We reverse.

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[1] Hereinafter Mary Carter or respondent.

Although there is some ambiguity in the Commission's opinion, we cannot say that its holding constituted a departure from Commission policy regarding the use of the commercially exploitable word "free." Initial efforts to define the term in decisions[2] were followed by "Guides Against Deceptive Pricing."[3] These informed businessmen that they might advertise an article as "free," even though purchase of another article was required, so long as the terms of the offer were clearly stated, the price of the article required to be purchased was not increased, and its quality and quantity were not diminished. With specific reference to two-for-the-price-of-one offers, the Guides required that either the sales price for the two be "the advertiser's usual and customary retail price for the single article in the recent, regular course of his business," or where the advertiser has not previously sold the article, the price for two be the "usual and customary" price for one in the relevant trade areas. These, of course, were guides, not fixed rules as such, and were designed to inform businessmen of the factors which would guide Commission decision. Although Mary Carter seems to have attempted to tailor its offer to come within their terms, the Commission found that it failed; the offer complied in appearance only.

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[2] *Book-of-the-Month Club, Inc.*, 48 F. T. C. 1297 (1952); *Walter J. Black, Inc.*, 50 F. T. C. 225 (1953); *Puro Co.*, 50 F. T. C. 454 (1953); *Book-of-the-Month Club, Inc.*, 50 F. T. C. 778 (1954); *Ray S. Kalwajtys*, 52 F. T. C. 721, enforced, 237 F. 2d 654 (1956).

[3] Guides Against Deceptive Pricing, Guide V, adopted October 2, 1958, 23 Fed. Reg. 7965; see also policy statement, December 3, 1953, 4 CCH Trade Reg. Rep. ¶ 40,210. For the current guide, Guide IV, effective January 8, 1964, see 29 Fed. Reg. 180.

The gist of the Commission's reasoning is in the hearing examiner's finding, which it adopted, that

> "the usual and customary retail price of each can of Mary Carter paint was not, and is not now, the price designated in the advertisement [$6.98] but was, and is now, substantially less than such price. The second can of paint was not, and is not now, 'free,' that is, was not, and is not now, given as a gift or gratuity. The offer is, on the contrary, an offer of two cans of paint for the price advertised as or purporting to be the list price or customary and usual price of one can." 60 F. T. C., at 1844.

In sum, the Commission found that Mary Carter had no history of selling single cans of paint; it was marketing twins, and in allocating what is in fact the price of two cans to one can, yet calling one "free," Mary Carter misrepresented. It is true that respondent was not permitted to show that the quality of its paint matched those paints which usually and customarily sell in the $6.98 range, or that purchasers of paint estimate quality by the price they are charged. If both claims were established, it is arguable that any deception was limited to a representation that Mary Carter has a usual and customary price for single cans of paint, when it has no such price. However, it is not for courts to say whether this violates the Act. "[T]he Commission is often in a better position than are courts to determine when a practice is 'deceptive' within the meaning of the Act." *Federal Trade Comm'n* v. *Colgate-Palmolive Co.,* 380 U. S. 374,

385. There was substantial evidence in the record to support the Commission's finding; its determination that the practice here was deceptive was neither arbitrary nor clearly wrong. The Court of Appeals should have sustained it. *Federal Trade Comm'n* v. *Colgate-Palmolive Co., supra; Carter Products, Inc.* v. *Federal Trade Comm'n,* 323 F. 2d 523, 528.

The Commission advises us in its brief that it believes it would be appropriate here "to remand the case to it for clarification of its order." The judgment of the Court of Appeals is therefore reversed and the case is remanded to that court with directions to remand to the Commission for clarification of its order.

It is so ordered.

MR. JUSTICE STEWART took no part in the decision of this case.

MR. JUSTICE HARLAN, dissenting.

In my opinion the basis for the Commission's action is too opaque to justify an upholding of its order in this case. A summary discussion of the facts and Commission proceedings will suffice to show why I cannot subscribe to the majority's disposition.

Since 1951 the enterprise now known as Mary Carter Paint Company has been manufacturing paint products for direct distribution through its own outlets and franchised dealers. For most or all of this period, its practice has been to establish its prices on a per-can basis but to give each customer a second can without further charge for each can purchased. Mary Carter's advertisements, while disclosing that the first can of each pair must be bought at the listed price, have always described the second can as "free"; typical slogans are: "Buy one get one free" and "Every second can free." It is this advertising which the Commission now condemns as unfair and deceptive under § 5 of the Federal Trade Commission Act, as amended, 52 Stat. 111, 15 U. S. C. § 45 (1964 ed.).

To the extent that the Commission's order may rest on the proposition that the second can is not "free" because its receipt is "tied" to the purchase of the first can, it is manifestly inconsistent with the rules governing use of the word "free" maintained by the Commission for over a decade. No one suggests that the additional can of Mary Carter paint is free in the sense that no conditions are attached to its receipt, but the FTC forsook this commercially unrealistic definition in 1953. In that year, first by its decision in *Walter J. Black, Inc.*, 50 F. T. C. 225, and then a general policy statement, 4 CCH Trade Reg. Rep. ¶ 40,210, it sanctioned use of the word "free" to describe an item given without extra charge on condition of another purchase so long as the condition was plainly stated and the "tying" product was not increased in price for the occasion or decreased in quantity or quality. The FTC prefaced these rules in *Black* by saying that "[t]he businessmen of the United States are entitled to a clear and unequivocal answer" and it represented that its new position would be maintained until either Congress or the courts decided otherwise. 50 F. T. C., at 232, 235.

There is presently no charge by the Commission that Mary Carter failed to comply with this general statement which continued in force through the proceedings and decision affecting Mary Carter. Rather, for the greater period of its advertising operations Mary Carter could properly claim to have relied on the FTC's official pronouncement while it was establishing its "every second can free" slogan in the public mind, an investment now seemingly lost. Without inflexibly holding the Commission to its promise and avowed position, certainly solid justification should be demanded before the courts agree that this departure is not "arbitrary, capricious, [or] an abuse of discretion." Administrative Procedure Act § 10 (e), 60 Stat. 243, 5 U. S. C. § 1009 (e) (1964 ed.).

At the very least the Commission should be required to demonstrate real deception and public injury in a decision that allows the courts to evaluate its reasoning and businessmen to comply with assurance with its latest views; these standards are not met by the FTC's opinion in this case. The Department of Justice suggests that the FTC regards the advertisements as implying that Mary Carter regularly sells its paint for the present per-can price without giving an extra can free;[1] from this premise, it might be argued, the buyer may then conclude that each can of Mary Carter is the equal of similarly priced rivals with whom it has regularly competed on equal terms in the past, making the present "free" can offer appear an excellent bargain. But the advertising in the present case does not really suggest that the "free" can is a departure from Mary Carter's usual pricing policy. Certainly nothing in any of the publicity states that the extra can is a "new" bargain or asserts that the opportunity may lapse in the near future. To the contrary, a number of Mary Carter advertisements, not separately treated by the Commission, affirmatively suggest that the extra-can offer has been and will continue to be the sales policy. Far from trying to imply that its extra-can offer represents a temporary saving for the customer, Mary Carter has striven over a number of years to associate itself irrevocably in the public mind with the notion that every second can is free; the catchphrase appears in one form or another in nearly all the ads before us and is even imprinted on the top of Mary Carter paint cans. Finally, it is not without irony that the Commission, presumably seeking to protect the consumer from any unfounded ultimate conclusions that a can of Mary Carter is as good as its high-priced rivals, rejected an offer of proof from the company that a single can of Mary Carter is scientifically equal or superior to the leading paints that sell at the same per-can price level without giving bonus cans. Actually, there is no suggestion that any volume of consumer complaints has been received, which further deepens the mystery why this frail proceeding was ever initiated.[2]

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[1] Such an implication might be thought to run counter to the spirit of the now-superseded Guide V, Guides Against Deceptive Pricing, 23 Fed. Reg. 7965 (1958), requiring that the sales price for two articles in a two-for-the-price-of-one sale must be the usual and customary price for one. Mary Carter can, of course, reasonably claim to have complied with the letter of Guide V; assuming that it is making a two-for-the-price-of-one offer in substance, the advertised sum is the usual and customary price which a purchaser has to pay in order to acquire a single can. There is evidence that on at least a few occasions customers took only one can, paying the advertised per-can price. There is no evidence that Mary Carter permitted or tolerated sales of single cans at less than the advertised per-can price.

The temptation to gloss over the analytical failings of the rationale now asserted for the FTC by relying on agency expertise must be short-lived in this case. Any findings by the FTC as to what the public may conclude from particular phrasings are most inexplicit, no distinction is taken between the various ads in question, and the conduct proscribed is never sharply identified. Surely there can be no resort to uninvoked expertise to buttress an unarticulated theory.

The opaqueness of the Commission's opinion and order makes their approval difficult for yet other reasons. The bite of the FTC decision is in its order, which even the Commission recognizes to be unclear; how the Commission order can be upheld before this Court is told what exactly it means is indeed a puzzling question. Additionally, by failing to spell out its rationale the FTC decision breeds the suspicion that it is not merely *ad hoc* [3] but quite possibly irreconcilable with the *Black* case seemingly reaffirmed by the Commission in this very proceeding. If the Commission is able to write an opinion and order that can cure these defects and draw the plain distinctions necessary to assure fair warning and equal treatment for other advertisers, it has not done so yet.

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[2] I put aside the argument that might arise from Mary Carter's practice of selling its paint in both gallon and quart cans. Conceivably, one might order a gallon and receive an unneeded extra gallon, never realizing that two quarts purchased plus two quarts free could be had for a smaller sum. The FTC ignored and the Government expressly disclaims reliance on any such argument. Moreover, many ads seem to give both quart and gallon prices.

In administering § 5 in the context of the many elusive questions raised by modern advertising, it is the duty of the Commission to speak and rule clearly so that law-abiding businessmen may know where they stand. In proscribing a practice uncomplained of by the public, effectively harmless to the consumer, allowed by the Commission's long-established policy statement, and only a hairbreadth away from advertising practices that the Commission will continue to permit, I think that the Commission in this instance has fallen far short of what is necessary to entitle its order to enforcement.

For these reasons I would not disturb the judgment of the Court of Appeals setting aside the Commission's order.

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[3] Of the post-1952 cases cited in the majority's note 2 (*ante*, p. 47), none is authority for condemning Mary Carter's advertising. *Puro Co.*, 50 F. T. C. 454 (1953), and *Ray S. Kalwajtys*, 52 F. T. C. 721, enforced, 237 F. 2d 654 (1956), both involved plain deceptions as to the usual prices of the items in question. *Book-of-the-Month Club, Inc.*, 50 F. T. C. 778 (1954), and the *Black* case both exculpate sellers under the rule finally appearing in the 1953 policy statement, with whose terms Mary Carter has complied.

LEH ET AL. *v.* GENERAL PETROLEUM CORP. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 4. Argued October 11, 1965.—Decided November 8, 1965.

Petitioners' private antitrust suit against seven gasoline producers was dismissed as untimely and not entitled to the benefit of § 5 (b) of the Clayton Act, which provides for tolling the statute of limitations during the pendency of an antitrust suit brought by the United States where the private action is "based in whole or in part on any matter complained of" in the government suit. The Court of Appeals, upholding the District Court, held that the statute of limitations was not suspended because there were different overt acts charged, and different conspiracies, occurring at different times between different parties. *Held:*

1. Petitioners' action here was based in part on matters complained of in the government suit and the § 5 (b) tolling provision was therefore applicable. *Minnesota Mining & Mfg. Co.* v. *New Jersey Wood Finishing Co.*, 381 U. S. 311, followed. Pp. 58–65.

(a) There was substantial identity of parties, six of the seven defendants here being defendants also in the government suit. Pp. 63–64.

(b) Though there was not complete overlap in the time periods of the two conspiracies alleged, and though the geographic areas covered were not coterminous (the southern California area involved in this action being only a part of the Pacific States area with which the Government's suit was concerned), these disparities are without legal significance. P. 64.

2. In general, the applicability of § 5 (b) is determined by a comparison of the two complaints on their face, and is not based on proof of the allegations made therein. Pp. 65–66.

330 F. 2d 288, reversed.

Richard G. Harris argued the cause for petitioners. With him on the brief was *Maxwell Keith.*

Francis R. Kirkham argued the cause for respondents. With him on the brief were *Jack E. Woods, Moses Lasky,* *Edmund D. Buckley, Wayne H. Knight, Howard Painter, William E. Mussman, Thomas E. Haven* and *George W. Jansen.*

MR. JUSTICE WHITE delivered the opinion of the Court.

On September 28, 1956, petitioners, a partnership engaged in wholesale distribution of refined petroleum products and one of the partners, filed in the Southern District of California a treble-damage action charging violations of §§ 1 and 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. §§ 1, 2 (1964 ed.), against seven companies engaged in producing, refining, and marketing gasoline and other hydrocarbon substances in interstate commerce. Defendants contended that the action was barred by the California one-year statute of limitations applicable to suits for statutory penalties or forfeitures, Cal. Code Civ. Proc. § 340 (1). Plaintiffs conceded that their cause of action accrued no later than February 1954, and that the four-year limitation provision added to the Clayton Act in 1955, Clayton Act § 4B, 69 Stat. 283, 15 U. S. C. § 15b (1964 ed.), was not applicable to a right of action accruing in 1954. But plaintiffs contended that the governing provision was the California three-year statute of limitations respecting actions on a statutory liability other than a penalty, Cal. Code Civ. Proc. § 338 (1), and that in any event the running of the statute of limitations was tolled by § 5 (b) of the Clayton Act, 38 Stat. 731, as amended, 15 U. S. C. § 16 (b) (1964 ed.), because of a civil antitrust proceeding that was commenced by the United States in 1950 and was still pending when plaintiffs filed their complaint. Section 5 (b) provides that during the pendency of a civil or criminal proceeding instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, the running of the statute of limitations shall be suspended in respect of every private right of action "based in whole or in part on any matter complained of in said proceeding."[1] The lower courts upheld the defense of limitations and dismissed the complaint, holding that the one-year statute governed and that plaintiffs were not entitled to the benefit of § 5 (b). 208 F. Supp. 289 (D. C. S. D. Cal. 1962), aff'd, 330 F. 2d 288 (C. A. 9th Cir. 1964). We granted certiorari limited to the question of the applicability of § 5 (b), 379 U. S. 877, because of an apparent conflict between this case and *Union Carbide & Carbon Corp.* v. *Nisley,* 300 F. 2d 561 (C. A. 10th Cir. 1962), dismissed under Rule 60 *sub nom. Wade* v. *Union Carbide & Carbon Corp.,* 371 U. S. 801, concerning interpretation of the statutory requirement that the private action for which the benefit of the tolling provision is sought be "based in whole or in part on any matter complained of" in the government proceeding. We conclude that the lower courts misapplied § 5 (b), and we reverse the judgment below.

Prior to the present case, the Court of Appeals for the Ninth Circuit had declared a restrictive interpretation of § 5 (b). In *Steiner* v. *20th Century-Fox Film Corp.,* 232 F. 2d 190 (1956), that court ruled that the scope of § 5 (b) was determined by the principles of collateral estoppel applicable under § 5 (a) of the Clayton Act, as amended, 69 Stat. 283, 15 U. S. C. § 16 (a) (1964 ed.), which provides that a final judgment or decree rendered in a suit by the United States and holding a defendant in violation of the antitrust laws shall be prima facie evidence in a private antitrust action against such defendant "as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto."[2] Accordingly, the court declared in *Steiner* that "[a] greater similarity is needed than that the same conspiracies are alleged. The same means must be used to achieve the same objectives of the same conspiracies by the same defendants." 232 F. 2d, at 196. In the present case the Court of Appeals purported to follow *Steiner* and concluded that the running of the statute of limitations was not suspended because here, in the court's opinion, "there were not only different overt acts charged, but different conspiracies, occurring at different times, between different parties." 330 F. 2d, at 301; see also 208 F. Supp., at 294–295. Conflicting with *Steiner* and the present case is *Union Carbide & Carbon Corp.* v. *Nisley, supra,* which held that the evidentiary rules of estoppel are not determinative and that the running of the period of limitations is tolled by § 5 (b) if there is "substantial identity of subject matter." 300 F. 2d, at 570.

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[1] Section 5 (b), 15 U. S. C. § 16 (b), provides:

"(b) Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however,* That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued."

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[2] Section 5 (a), 15 U. S. C. § 16 (a), provides:

"(a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided,* That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 15a of this title."

See generally *Emich Motors Corp.* v. *General Motors Corp.,* 340 U. S. 558.

Minnesota Mining & Mfg. Co. v. *New Jersey Wood Finishing Co.,* 381 U. S. 311, which was decided in the interim between the granting of certiorari and oral argument in the present case, establishes certain basic principles for the construction of § 5 (b) that are to be followed here. The questions presented for decision in *Minnesota Mining* were whether proceedings by the Federal Trade Commission under § 7 of the Clayton Act, 38 Stat. 731, as amended, 15 U. S. C. § 18 (1964 ed.), activate § 5 (b) to the same extent as judicial proceedings and, if so, whether the claim of New Jersey Wood, the private plaintiff, was based on "any matter complained of" in the Commission action. One of the arguments advanced with respect to the first question was that Commission proceedings did not suspend the running of limitations because, it was asserted, any Commission order that might issue would not be admissible under § 5 (a). We rejected this contention that § 5 (a) and § 5 (b) were coextensive.

> "It may be . . . that when it was enacted the tolling provision was a logical backstop for the prima facie evidence clause of § 5 (a). But even though § 5 (b) complements § 5 (a) in this respect by permitting a litigant to await the outcome of government proceedings and use any judgment or decree rendered therein . . . it is certainly not restricted to that effect. As we have pointed out, the textual distinctions as well as the policy basis of § 5 (b) indicate that it was to serve a more comprehensive function in the congressional scheme of things. The Government's initial action may aid the private litigant in a number of other ways. The pleadings, transcripts of testimony, exhibits and documents are available to him in most instances. . . . Moreover, difficult questions of law may be tested and defini-

tively resolved before the private litigant enters the fray. The greater resources and expertise of the Commission and its staff render the private suitor a tremendous benefit aside from any value he may derive from a judgment or decree. Indeed, so useful is this service that government proceedings are recognized as a major source of evidence for private parties." 381 U. S., at 319.

Minnesota Mining sweeps away much of the foundation for the *Steiner* view of the scope of § 5 (b). The private plaintiff is not required to allege that the same means were used to achieve the same objectives of the same conspiracies by the same defendants. Rather, effect must be given to the broad terms of the statute itself—"based *in whole or in part* on *any matter* complained of" (emphasis added)—read in light of Congress' "belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws." 381 U. S., at 318. Doubtlessly, care must be exercised to insure that reliance upon the government proceeding is not mere sham and that the matters complained of in the government suit bear a real relation to the private plaintiff's claim for relief. But the courts must not allow a legitimate concern that invocation of § 5 (b) be made in good faith to lead them into a niggardly construction of the statutory language here in question. With those matters in mind we now turn to a comparison of plaintiffs' complaint with the complaint in the government proceeding on which plaintiffs rely, *United States* v. *Standard Oil Co. of California,* Civil No. 11584–C, D. C. S. D. Cal.[3]

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[3] The case has since been terminated by consent judgments entered into by all defendants except the Conservation Committee of California Oil Producers and Texaco, Inc., as to each of which the case was dismissed. See 1958 CCH Trade Cases, ¶ 69,212; 1959 CCH Trade Cases, ¶ 69,240; 1959 CCH Trade Cases, ¶ 69,399.

The complaint of the United States charged that seven petroleum companies and the Conservation Committee of California Oil Producers had conspired together to restrain and to monopolize interstate commerce in the Pacific States area in violation of §§ 1 and 2 of the Sherman Act, beginning in or about the year 1936, and continuing up to and including the date suit was filed in 1950. The complaint divided the conspiracy into two principal branches: (1) agreement by the defendants to eliminate competition among themselves in the Pacific States area and (2) agreement by the defendants to utilize their control of the production, transportation, refining, and marketing of crude oil and refined petroleum products to restrict and to eliminate the competition of independent producers, refiners and marketers in the Pacific States area. In furtherance of the first branch of the conspiracy, the complaint further charged, defendants had conspired to do and had actually accomplished the following things, among others: sharing wholesale and retail markets with each other by selling gasoline and other refined petroleum products at identical prices, thus confining effective competition among themselves to the advertising of brand names and to the offering of free services in their retail outlets; fixing and maintaining uniform and noncompetitive prices for the sale of gasoline and other refined petroleum products at wholesale and at retail; refusing to sell their petroleum products to any wholesale or retail distributor who failed or refused to follow the prices fixed by them; and refusing to sell their petroleum products to any wholesale distributor, jobber, or retail dealer except on a "full-requirements" or "exclusive-dealer" basis. Among acts and agreements charged as having been accomplished in furtherance of the second branch of the conspiracy were the following: coercing independent producers into limiting production of crude oil through production quotas established by the defendant Conservation Committee; limiting the supply of crude oil available to independent refiners and refusing to sell crude oil to such refiners; acquiring control of independent refiners; inducing independent refiners to shut down their productive capacity or to dismantle their refining facilities in return for an agreement to furnish such independent refiners with their full requirements of gasoline and other refined petroleum products; foreclosing independent wholesale and retail markets otherwise available to the independent refiners by requiring independent jobbers, wholesalers, and retailers to handle exclusively the refined petroleum products of defendants.

Plaintiffs' amended complaint in the present case also charged a conspiracy to violate §§ 1 and 2 of the Sherman Act. The period of the conspiracy of which plaintiffs complained varied somewhat from that charged in the government action, plaintiffs alleging that the conspiracy herein commenced in or about the year 1948 (the year in which plaintiffs commenced business) and continued until the date of the filing of the complaint in 1956. The defendants were the same as those in the government proceeding, except that Shell Oil Company and the Conservation Committee of California Oil Producers were named as defendants in the government suit and were not defendants here, and Olympic Oil Company was named as a defendant here and was not a defendant in the government proceeding.[4] The complaint charged that defendants had agreed to restrain and to monopolize the wholesale and retail distribution of refined gasoline throughout the southern California area by excluding independent jobbers from such distribution and by eliminating the jobbers' customers, *i. e.*, retail outlets, and preventing those customers from competing with retail outlets owned and operated by defendants. In particular, defendants were alleged to have accomplished their unlawful purposes by the following acts: controlling the sale and distribution of refined gasoline in the southern California area; denying independent jobbers access to a source of supply of refined gasoline; preventing independent jobbers from obtaining refined gasoline from other sources; preventing the customers of independent jobbers from obtaining gasoline with which to compete with retail service stations and outlets operated or controlled by defendants; maintaining fixed, artificial, and noncompetitive prices for the wholesale and retail sale of refined gasoline in the southern California area and fixing the price at which gasoline would be sold, if at all, to independent dealers and jobbers; and generally controlling the sources of refined gasoline in the southern California area and preventing and precluding independent jobbers from obtaining a source of supply. Plaintiffs claimed injury to their independent jobber business through a loss of profits resulting from price-fixing and from the destruction of their business because of the termination of their source of supply.

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[4] Olympic was dismissed from the case prior to the ruling on defendants' statute of limitations defense.

The lower courts found that plaintiffs' complaint was not based in whole or in part on any matter complained of in the government proceeding principally because of the differences in the defendants named in the two suits and in the period of the conspiracies alleged. See 330 F. 2d, at 301; 208 F. Supp., at 294–295. We cannot agree that these differences bar resort to the tolling provision in this case.

Here too we may find guidance in *Minnesota Mining*. In that case, the plaintiff, a manufacturer of electrical insulation materials, brought suit against Minnesota Mining and Manufacturing Company and the Essex Wire Corporation, the complaint alleging violations of § 7 of the Clayton Act and §§ 1 and 2 of the Sherman Act. The substance of the complaint concerned the acquisition by Minnesota Mining from Essex of Insulation and Wires, Inc., which thereafter ceased to distribute plaintiff's products, and an alleged conspiracy between Minnesota Mining and Essex to restrain trade in electrical insulation products. The action upon which plaintiff relied as suspending the running of limitations was a Federal Trade Commission proceeding under § 7 against Minnesota Mining but not against Essex. Essex was not a party to the interlocutory appeal in the private action and no contention was made here that the difference in parties prevented tolling of limitations as to Minnesota Mining. Minnesota Mining did argue that because of the greater burden of proof under the Sherman Act, plaintiff's Sherman Act claims could not be held to be based in part on any matter complained of in the Clayton Act proceeding before the Commission. This Court found that "both suits set up substantially the same claims," 381 U. S., at 323, and rejected Minnesota Mining's argument.

Just as in *Minnesota Mining* the differences between Sherman Act and Clayton Act proceedings were held not to require the conclusion that the private action under the Sherman Act was not based in part on any matter complained of in the Government's § 7 suit, so here we cannot conclude that a private claimant may invoke § 5 (b) only if the conspiracy of which he complains has the same breadth and scope in time and participants as the conspiracy described in the government action on which he relies. Here there is substantial identity of parties, six of the seven defendants in this case being defendants in the government suit as well. In suits of this kind, the absence of complete identity of defendants may be explained on several grounds unrelated to the question of whether the private claimant's suit is based on matters of which the Government complained. In the interim between the filing of the two actions it may have become apparent that a party named as a defendant by the Government was in fact not a party to the antitrust violation alleged. Or the private plaintiff may prefer to limit his suit to the defendants named by the Government whose activities contributed most directly to the injury of which he complains. On the other hand, some of the conspirators whose activities injured the private claimant may have been too low in the conspiracy to be selected as named defendants or co-conspirators in the Government's necessarily broader net. The overlap in the time periods of the two conspiracies is less complete, but this disparity is equally without significance. That plaintiffs alleged a conspiracy corresponding in time to the period during which they were in business obviously does not mean that this conspiracy is not based in part on matters complained of by the Government. Nor can that conclusion be drawn from the fact that plaintiffs focus on the southern California area, which is only a part of the Pacific States area with which the Government was concerned.

It is obvious from a comparison of the two complaints that plaintiffs' suit is based in part on matters of which the Government complained. The Government charged that defendants had conspired to eliminate the competition of independent marketers; plaintiffs charged a conspiracy to eliminate independent jobbers and retailers. Both the plaintiffs and the Government alleged that defendants had fixed prices at wholesale and at retail. The Government alleged that defendants had conspired to eliminate the competition of independent refiners by acquiring such refiners, limiting the supply of crude oil available to them, and inducing them to shut down their refining facilities; plaintiffs complained that defendants had denied them a source of supply and prevented them from obtaining gasoline from other sources. To require more detailed duplication of claims would be to resurrect the collateral estoppel approach declared in *Steiner* and rejected by this Court in *Minnesota Mining.*

Defendants contend, however, that during the extensive discovery proceedings that preceded the ruling on the motion to dismiss, plaintiffs made certain concessions establishing that, whatever the complaint may allege, plaintiffs' claim in fact is not based at all on any matter complained of by the Government in *Standard Oil.* Plaintiffs' real claim, defendants say, is that they had an arrangement with Olympic Refining Company under which they were to be supplied with gasoline as long as Olympic was in turn supplied by defendant General Petroleum Corporation, that defendant Standard Oil Company of California replaced General Petroleum Corporation as Olympic's supplier in February 1954, and that plaintiffs' supply was thereby terminated. The attorney for plaintiffs stated in a hearing before the trial court that General Petroleum Corporation had the absolute right to terminate its supply to Olympic at any time and that if General had in this case done so unilaterally plaintiffs would not be in court. But plaintiffs contended that defendants conspired together to effect the termination of General's supplier relationship with Olympic. Defendants argue that this conspiracy to terminate a particular supply contract is far removed from the matters with which the government complaint was concerned.

In general, consideration of the applicability of § 5 (b) must be limited to a comparison of the two complaints on their face. Obviously suspension of the running of the statute of limitations pending resolution of the government action may not be made to turn on whether the United States is successful in proving the allegations of its complaint. *Minnesota Mining & Mfg. Co.* v. *New*

Jersey Wood Finishing Co., 381 U. S. 311, 316. Equally, the availability of § 5 (b) to the private claimant may not be made dependent on his ability to prove his case, however fatal failure may prove to his hopes of success on the merits.

Moreover, defendants' argument contains a basic flaw in that it does not take account of all that plaintiffs' counsel said. The relationship between plaintiffs and General was one of subdistributorship, and there were accordingly two levels in the chain of distribution between General and the ultimate retail outlet. Plaintiffs claimed, counsel said, that pressure was exerted to terminate the relationship between General and Olympic, and thereby between Olympic and plaintiffs, as the result of an industry commitment to do away with subdistributorship operations "because the sub-distributorship could not be controlled. The gasoline could be controlled, obviously, when General Petroleum sold it directly at retail. The gasoline could be controlled if you had a good company as opposed to a bad company, which was acting as a distributor. But the gasoline could not be controlled when it went to the sub-distributorship level." Clearly this is a claim that in order to obtain and to maintain control of distribution and retail marketing, including the control and fixing of uniform wholesale and retail prices of which the government action complained, defendants agreed to tighten control of the chain of distribution through elimination of independent jobbers acting as subdistributors. Counsel's statements simply filled out the details of the general allegations of the complaint.

As we have concluded that the running of the statute of limitations was suspended, the judgment must be

Reversed.

MR. JUSTICE HARLAN and MR. JUSTICE FORTAS took no part in the consideration or decision of this case.

ANDREWS VAN LINES, INC., ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA.

No. 438. Decided November 8, 1965.

240 F. Supp. 763, affirmed.

J. Max Harding for appellants.

Solicitor General Marshall, Assistant Attorney General Turner, Robert B. Hummel, Gerald Kadish, Robert W. Ginnane and *Thomas H. Ploss* for the United States et al.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.

MR. JUSTICE STEWART is of the opinion that probable jurisdiction should be noted.

McGEE *v.* CROUSE, WARDEN.

APPEAL FROM THE SUPREME COURT OF KANSAS.

No. 550, Misc. Decided November 8, 1965.

Appeal dismissed and certiorari denied.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

RICHMOND TELEVISION CORP. *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 420. Decided November 8, 1965.

Certiorari granted; 345 F. 2d 901, vacated and remanded.

Robert T. Barton, Jr., for petitioner.

Solicitor General Marshall and *Acting Assistant Attorney General Roberts* for the United States.

PER CURIAM.

The petition for writ of certiorari is granted. In the light of the representations of the Solicitor General, and an independent examination of the record, we believe that the Court of Appeals for the Fourth Circuit was mistaken in its view that the petitioner's amortization claims for the taxable years 1956 and 1957 were not properly before it. Although the record is not free from ambiguity, we take the Court of Appeals to have based its decision on the ground that the petitioner's amortization claims derived solely from net operating loss deductions carried forward from prior years, and that no additional amortization deductions for 1956 and 1957 were sought. Since we find that the petitioner adequately presented its amortization claims for 1956 and 1957, we vacate the judgment of the Court of Appeals and remand the case to that court for the consideration of those claims, without intimation of any kind as to their merit.

MILLAN-GARCIA *v.* IMMIGRATION AND NATURALIZATION SERVICE.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 369, Misc. Decided November 8, 1965.

Certiorari granted; 343 F. 2d 825, vacated and remanded.

Petitioner *pro se.*

Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg and *Julia P. Cooper* for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded to the Court of Appeals upon examination of the entire record and in light of the representations of the Solicitor General that the petitioner will be afforded an opportunity to apply for citizenship and that there will be no deportation proceedings until such determination.

ALBERTSON ET AL. *v.* SUBVERSIVE ACTIVITIES CONTROL BOARD.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 3. Argued October 18, 1965.—Decided November 15, 1965.

Despite the order of the Subversive Activities Control Board (SACB), sustained in *Communist Party of the United States* v. *SACB,* 367 U. S. 1, the Party failed to register under the Subversive Activities Control Act of 1950, and no list of members was filed. The Attorney General, in accordance with § 13 (a) and §§ 8 (a) and (c) of the Act, asked the SACB to order petitioners, as Party members, to register and submit a registration statement. The SACB did order petitioners to register and submit the registration statement and the Court of Appeals affirmed these orders, finding the Fifth Amendment self-incrimination issue not ripe for adjudication. *Held:*

1. Petitioners' claims of the privilege against self-incrimination are ripe for adjudication. Pp. 73–77.

(a) As distinguished from the *Communist Party* case, the contingencies upon which the members' duty to register arises have matured, the petitioners have claimed the privilege and the Attorney General has rejected such claims. Pp. 74–75.

(b) Petitioners are faced with the choice of registering without a decision on the merits of their claims or subjecting themselves to serious punishment. Pp. 75–76.

(c) Respondent's attempt to distinguish between claims of privilege relating to the SACB's power to compel registration and submission of a registration statement, concerning which it concedes that the Court of Appeals' holding of prematurity was erroneous, and claims of privilege against "any particular inquiry" on the registration form or registration statement, is without merit. The statute and regulations issued thereunder require petitioners to register and submit the forms fully executed in accordance with present regulations. Pp. 76–77.

2. The requirement of filing the registration form (IS–52a) is incriminatory within the meaning of the Self-Incrimination Clause because the admission of Party membership, required by the form, might be used as an investigatory lead to or evidence in a criminal prosecution. Pp. 77–78.

3. The requirement of completing and filing the registration statement (IS–52), considered apart from the registration form, would also be incriminatory because the information might be used as evidence in or supply leads to a criminal prosecution. *United States* v. *Sullivan*, 274 U. S. 259, distinguished. Pp. 78–79.

4. The Act's immunity provision, § 4 (f), does not save the orders to register from petitioners' Fifth Amendment challenge. Pp. 79–81.

(a) The immunity provision does not preclude the use of information called for by the registration statement (IS–52), either as evidence or an investigatory lead. P. 80.

(b) The immunity provision does not preclude the use of an admission of Party membership on the registration form (IS–52a) as an investigatory lead, a use barred by the self-incrimination privilege. P. 80.

(c) Respondent's argument that since an order to register follows an SACB finding of Party membership, the admission of Party membership by registering is of no investigatory value and thus not "incriminatory," would make the right to invoke the privilege depend upon an assessment of information in the Government's possession. This would negate the complete protection from all perils that an immunity statute must provide according to *Counselman* v. *Hitchcock*, 142 U. S. 547. P. 81.

118 U. S. App. D. C. 117, 332 F. 2d 317, reversed.

John J. Abt argued the cause for petitioners. With him on the briefs was *Joseph Forer*.

Kevin T. Maroney argued the cause for respondent. With him on the brief were *Solicitor General Marshall*, *Assistant Attorney General Yeagley*, *Nathan Lewin*, *George B. Searls* and *Lee B. Anderson*.

Briefs of *amici curiae* were filed by *Osmond K. Fraenkel* for the American Civil Liberties Union, and by *Ernest Goodman* for the National Lawyers Guild.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The Communist Party of the United States of America failed to register with the Attorney General as required by the order of the Subversive Activities Control Board sustained in *Communist Party of the United States* v. *SACB*, 367 U. S. 1.[1] Accordingly, no list of Party members was filed as required by § 7 (d)(4) of the Subversive Activities Control Act of 1950, 64 Stat. 993–994, 50 U. S. C. § 786 (d)(4) (1964 ed.).[2] Sections 8 (a) and (c) of the Act provide that, in that circumstance, each member of the organization must register and file a registration statement; in default thereof, § 13 (a) authorizes the Attorney General to petition the Board for an order requiring the member to register.[3] The

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[1] The judgment of conviction of the Party for failure to register was reversed by the Court of Appeals for the District of Columbia Circuit, and the case remanded for a new trial. *Communist Party of the United States* v. *United States*, 118 U. S. App. D. C. 61, 331 F. 2d 807.

[2] Under this section the registration statement which accompanies the registration of a Communist-action organization is required to include "the name and last-known address of each individual who was a member of the organization at any time during the period of twelve full calendar months preceding the filing of such statement."

[3] Sections 8 (a) and (c), 64 Stat. 995, 50 U. S. C. §§ 787 (a) and (c) (1964 ed.), provide:

"(a) Any individual who is or becomes a member of any organization concerning which (1) there is in effect a final order of the Board requiring such organization to register under section 786 (a) of this title as a Communist-action organization, (2) more than thirty days have elapsed since such order has become final, and (3) such organization is not registered under section 786 of this title as a Communist-action organization, shall within sixty days after said order has become final, or within thirty days after becoming a member of such organization, whichever is later, register with the Attorney General as a member of such organization.

. . . . .

"(c) The registration made by any individual under subsection (a) or (b) of this section shall be accompanied by a registration statement to be prepared and filed in such manner and form, and containing such information, as the Attorney General shall by regulations prescribe."

Section 13 (a), 64 Stat. 998, 50 U. S. C. § 792 (a) (1964 ed.), provides: "Whenever the Attorney General shall have reason to believe that . . . any individual who has not registered under section 787

Attorney General invoked § 13 (a) against petitioners, and the Board, after evidentiary hearings, determined that petitioners were Party members and ordered each of them to register pursuant to §§ 8 (a) and (c). Review of the orders was sought by petitioners in the Court of Appeals for the District of Columbia Circuit under § 14 (a).[4] The Court of Appeals affirmed the orders, 118 U. S. App. D. C. 117, 332 F. 2d 317. We granted certiorari, 381 U. S. 910. We reverse.[5]

I.

Petitioners address several constitutional challenges to the validity of the orders, but we consider only the con-

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of this title is in fact required to register under such section, he shall file with the Board and serve upon such . . . individual a petition for an order requiring such . . . individual to register pursuant to such subsection or section, as the case may be. Each such petition shall be verified under oath, and shall contain a statement of the facts upon which the Attorney General relies in support of his prayer for the issuance of such order."

[4] Section 14 (a), 64 Stat. 1001, 50 U. S. C. § 793 (a) (1964 ed.), provides:

"The party aggrieved by any order entered by the Board . . . may obtain a review of such order by filing in the United States Court of Appeals for the District of Columbia, within sixty days from the date of service upon it of such order, a written petition praying that the order of the Board be set aside. . . . Upon the filing of such petition the court shall have jurisdiction of the proceeding and shall have power to affirm or set aside the order of the Board . . . . The findings of the Board as to the facts, if supported by the preponderance of the evidence, shall be conclusive. . . . The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari . . . ."

[5] The Government's opposition to the petition for certiorari suggested that the case is moot as to petitioner Albertson by reason of his alleged expulsion from the Party. Albertson, however, challenges the suggestion of mootness. There is no occasion to decide the question since, in any event, we must reach the merits of the issues in respect of an identical order issued against petitioner Proctor.

tention that the orders violate their Fifth Amendment privilege against self-incrimination.[6]

The Court of Appeals affirmed the orders without deciding the privilege issue, expressing the view that under our decision in *Communist Party,* 367 U. S., at 105–110, the issue was not ripe for adjudication and would be ripe only in a prosecution for failure to register if the petitioners did not register. 118 U. S. App. D. C., at 121–123, 332 F. 2d, at 321–323. We disagree. In *Communist Party* the Party asserted the privilege on behalf of unnamed officers—those obliged to register the Party and those obliged "to register for" the Party if it failed to do so.[7] The self-incrimination claim asserted on behalf of the latter officers was held premature because the Party might choose to register and thus the duty of those officers might never arise. Here, in contrast, the contingencies upon which the members' duty to register arises have already matured; the Party did not register within 30 days after the order to register became final and the requisite 60 days since the order became final have elapsed. As to the officers obliged to register the Party, *Communist Party* held that the self-incrimination claim asserted on their behalf was not ripe for adjudication because it was not known whether they would ever claim the privilege or whether the claim, if asserted, would be honored by the Attorney General. But with respect to the orders in this case, addressed to named individuals, both these contingencies are foreclosed. Petitioners asserted the privilege in their answers to the Attorney General's petitions; they did not testify at the Board hearings; they again asserted the privilege in the review proceedings in the Court of Appeals. In each instance the Attorney General rejected their claims. Thus, the considerations which led the Court in *Communist Party* to hold that the claims on behalf of unnamed officers were premature are not present in this case.

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[6] Petitioners' other challenges assailed the Act and registration orders as denying substantive due process (because they allegedly serve no governmental purpose), as abridging First Amendment freedoms, as violating procedural due process and constituting bills of attainder (because they made the Board's 1953 determination that the Communist Party was a Communist-action organization conclusive upon petitioners), and finally, as denying petitioners the safeguards of grand jury indictment, judicial trial and trial by jury.

[7] The regulations governing Party registration pursuant to § 7 (d), 50 U. S. C. § 786 (d), are 28 CFR §§ 11.200 and 11.201, and the forms are IS–51a and IS–51. The regulation governing officers obliged by § 7 (h), 50 U. S. C. § 786 (h) "to register for" the Party if it failed to register is 28 CFR § 11.205. See *Communist Party,* 367 U. S., at 105–110.

There are other reasons for holding that petitioners' self-incrimination claims are ripe for decision. Specific orders requiring petitioners to register have been issued. The Attorney General has promulgated regulations requiring that registration shall be accomplished on Form IS-52a and that the accompanying registration statement shall be a completed Form IS-52,[8] 28 CFR §§ 11.206, 11.207, and petitioners risk very heavy penalties if they fail to register by completing and filing these forms. Under § 15 (a)(2) of the Act, 64 Stat. 1002, 50 U. S. C. § 794 (a)(2), for example, each day of failure to register constitutes a separate offense punishable by a fine of up to $10,000 or imprisonment of up to five years, or both.[9] Petitioners must either register without a decision on the merits of their privilege claims, or fail to register and risk onerous and rapidly mounting penalties while awaiting the Government's pleasure whether to initiate a prosecution against them. To ask, in these circumstances, that petitioners await such a prosecution for an adjudication of their self-incrimination claims is, in effect, to contend that they should be denied the protection of the Fifth Amendment privilege intended to relieve claimants of the necessity of making a choice between incriminating themselves and risking serious punishments for refusing to do so.

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[8] Copies of Form IS-52a and Form IS-52 are reproduced in the Appendix to this opinion.

[9] The case was argued orally by both sides on the premise that the penalty for failure to complete and file Form IS-52 constituted a separate offense punishable by fine of up to $10,000 or imprisonment of up to five years, or both, but that each day of failure to file the form did not constitute a separate offense. We have no occasion, however, to decide the question, and intimate no view upon it. See § 15 (b), 50 U. S. C. § 794 (b).

Indeed the Government concedes in its brief in this Court that the Court of Appeals' holding of prematurity was erroneous insofar as petitioners' claims of privilege relate to the Board's power to compel the act of registration and the submission of an accompanying registration statement. The brief candidly acknowledges that, since § 14 (b) provides for judicial review of a Board order to register, petitioners' claims in that regard, like any other contention that an order is invalid, may be heard and determined by the reviewing court—thus distinguishing orders that are not similarly reviewable, see *Alexander* v. *United States,* 201 U. S. 117; *Cobbledick* v. *United States,* 309 U. S. 323. Nevertheless, the Government argues that petitioners' claims are premature insofar as they relate to "any particular inquiry" on Forms IS–52a and IS–52. Two contingencies are hypothesized in support of this contention: (1) that the Attorney General might alter the present forms or (2) that he might accept less than fully completed forms.

The distinction upon which this argument is predicated is illusory. Neither the statute nor the regulations draw any distinction between the act of registering and the submission of a registration statement, on the one hand, and, on the other hand, the answering of the inquiries demanded by the forms; the statute and regulations contemplate rather that the questions asked on the forms are to be fully and completely answered. Morever, the contingencies hypothesized are irrelevant. Petitioners are obliged to register and to submit registration forms in accordance with presently existing regulations; the mere contingency that the Attorney General might revise the regulations at some future time does not render premature their challenge to the existing requirements. Nor can these requirements be viewed as requiring that petitioners answer—at the risk of criminal prosecution for error—only those items which will not incriminate petitioners; full compliance is required. Finally, the Government's argument would do violence to the congressional scheme. The penalties are incurred only upon failure to register as required by final orders and, under § 14 (b), orders become final upon completion of judicial review. In so providing, Congress plainly manifested an intention to afford alleged members, prior to criminal prosecution for failure to register, an adjudication of all, not just some, of the claims addressed to the validity of the Board's registration orders. We therefore proceed to a determination of the merits of petitioners' self-incrimination claims.

II.

The risks of incrimination which the petitioners take in registering are obvious. Form IS–52a requires an admission of membership in the Communist Party. Such an admission of membership may be used to prosecute the registrant under the membership clause of the Smith Act, 18 U. S. C. § 2385 (1964 ed.), or under § 4 (a) of the Subversive Activities Control Act, 64 Stat. 991, 50 U. S. C. § 783 (a) (1964 ed.), to mention only two federal criminal statutes. *Scales* v. *United States,* 367 U. S. 203, 211. Accordingly, we have held that mere association with the Communist Party presents sufficient threat of prosecution to support a claim of privilege. *Patricia Blau* v. *United States,* 340 U. S. 159; *Irving Blau* v.

United States, 340 U. S. 332; *Brunner* v. *United States*, 343 U. S. 918; *Quinn* v. *United States*, 349 U. S. 155. These cases involved questions to witnesses on the witness stand, but if the admission cannot be compelled in oral testimony, we do not see how compulsion in writing makes a difference for constitutional purposes. Cf. *New York ex rel. Ferguson* v. *Reardon*, 197 N. Y. 236, 243-244, 90 N. E. 829, 832. It follows that the requirement to accomplish registration by completing and filing Form IS-52a is inconsistent with the protection of the Self-Incrimination Clause.

The statutory scheme, in providing that registration "shall be accompanied" by a registration statement, clearly implies that there is a duty to file Form IS-52, the registration statement, only if there is an enforceable obligation to accomplish registration by completing and filing Form IS-52a. Yet, even if the statute and regulations required petitioners to complete and file Form IS-52 without regard to the validity of the order to register on Form IS-52a, the requirement to complete and file Form IS-52 would also invade the privilege. Like the admission of Party membership demanded by Form IS-52a, the information called for by Form IS-52—the organization of which the registrant is a member, his aliases, place and date of birth, a list of offices held in the organization and duties thereof—might be used as evidence in or at least supply investigatory leads to a criminal prosecution. The Government, relying on *United States* v. *Sullivan*, 274 U. S. 259, argues that petitioners might answer some questions and appropriately claim the privilege on the form as to others, but cannot fail to submit a registration statement altogether. Apart from our conclusion that nothing in the Act or regulations permits less than literal and full compliance with the requirements of the form, the reliance on *Sulli-*

van is misplaced. *Sullivan* upheld a conviction for failure to file an income tax return on the theory that "[i]f the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all." 274 U. S., at 263. That declaration was based on the view, *first,* that a self-incrimination claim against every question on the tax return, or based on the mere submission of the return, would be virtually frivolous, and *second,* that to honor the claim of privilege not asserted at the time the return was due would make the taxpayer rather than a tribunal the final arbiter of the merits of the claim. But neither reason applies here. A tribunal, the Board, had an opportunity to pass upon the petitioners' self-incrimination claims; and since, unlike a tax return, the pervasive effect of the information called for by Form IS–52 is incriminatory, their claims are substantial and far from frivolous. In *Sullivan* the questions in the income tax return were neutral on their face and directed at the public at large, but here they are directed at a highly selective group inherently suspect of criminal activities. Petitioners' claims are not asserted in an essentially non-criminal and regulatory area of inquiry, but against an inquiry in an area permeated with criminal statutes, where response to any of the form's questions in context might involve the petitioners in the admission of a crucial element of a crime.

III.

Section 4 (f) of the Act,[10] the purported immunity provision, does not save the registration orders from peti-

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[10] Section 4 (f), 64 Stat. 992, 50 U. S. C. § 783 (f) provides:

"Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of tioners' Fifth Amendment challenge. In *Counselman* v. *Hitchcock,* 142 U. S. 547, decided in 1892, the Court held "that no [immunity] statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him, can have the effect of supplanting the privilege . . . ," and that such a statute is valid only if it supplies "a complete protection from all the perils against which the constitutional prohibition was designed to guard . . ." by affording "absolute immunity against future prosecution for the offence to which the question relates." *Id.,* at 585–586. Measured by these standards, the immunity granted by § 4 (f) is not complete. See *Scales* v. *United States,* 367 U. S., at 206–219. It does not preclude any use of the information called for by Form IS–52, either as evidence or as an investigatory lead. With regard to the act of registering on Form IS–52a, § 4 (f) provides only that the admission of Party membership thus required shall not *per se* constitute a violation of §§ 4 (a) and (c) or any other criminal statute, or "be received in evidence" against a registrant in any criminal prosecution; it does not preclude the use of the admission as an investigatory lead, a use which is barred by the privilege. *Counselman* v. *Hitchcock,* 142 U. S., at 564–565, 585.[11]

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subsection (a) or subsection (c) of this section or of any other criminal statute. The fact of the registration of any person under section 787 or section 788 of this title as an officer or member of any Communist organization shall not be received in evidence against such person in any prosecution for any alleged violation of subsection (a) or subsection (c) of this section or for any alleged violation of any other criminal statute."

[11] The legislative history includes several expressions of doubt that the immunity granted was coextensive with the privilege. See S. Rep. No. 2369, 81st Cong., 2d Sess., Pt. 2, pp. 12–13 (Sen. Kilgore) (Minority Report); 96 Cong. Rec. 14479 (Sen. Humphrey); 96 Cong. Rec. 15199 and 15554 (Sen. Kefauver); see also 96 Cong. Rec. 13739–13740 (Rep. Celler), dealing with a more modified immunity

The Government does not contend that the shortcoming of § 4 (f) is remedied in regard to information called for on the registration statement, Form IS–52. With respect to Form IS–52a, however, the argument is made that, since an order to register is preceded by a Board finding of Party membership, the admission of membership required on that form would be of no investigatory value and thus is not "incriminatory" within the meaning of the Fifth Amendment privilege. On this view the incompleteness of the § 4 (f) grant of immunity would be rendered immaterial and the admission of Party membership could be compelled without violating the privilege. We disagree. The judgment as to whether a disclosure would be "incriminatory" has never been made dependent on an assessment of the information possessed by the Government at the time of interrogation; the protection of the privilege would be seriously impaired if the right to invoke it was dependent on such an assessment, with all its uncertainties. The threat to the privilege is no less present where it is proposed that this assessment be made in order to remedy a shortcoming in a statutory grant of immunity. The representation that the information demanded is of no utility is belied by the fact that the failure to make the disclosure is so severely sanctioned; and permitting the incompleteness of § 4 (f) to be cured by such a representation would render illusory the *Counselman* requirement that a statute, in order to supplant the privilege, must provide "complete protection from all the perils against which the constitutional prohibition was designed to guard."

The judgment of the Court of Appeals is reversed and the Board's orders are set aside.

It is so ordered.

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grant in H. R. 9490. See generally *Scales* v. *United States*, 367 U. S., at 212–219 (Court opinion), 282–287 (dissenting opinion).

MR. JUSTICE BLACK concurs in the reversal for all the reasons set out in the Court's opinion as well as those set out in his dissent in *Communist Party of the United States* v. *SACB*, 367 U. S. 1, 137.

MR. JUSTICE WHITE took no part in the consideration or decision of this case.

APPENDIX TO OPINION OF THE COURT.

Form IS-52a is as follows:

Form No. IS-52a
(Ed. 9-6-61)

Budget Bureau No. 43-R414
Approval expires July 31, 1966

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

REGISTRATION FORM FOR INDIVIDUALS

Pursuant to Section 8(a) or (b) of
the Internal Security Act of 1950

(NOTE: This form should be accompanied by a Registration Statement, Form IS-52)

.... hereby
(Name of individual—Print or type)
registers as a member of ....,
a Communist-action organization.

/s/ ....
(Signature) (Date)

....
(Typed or printed name) (Date)

....
(Address—type or print)

Form IS-52 is as follows:

Budget Bureau No. 43-R301.2
Approval expires July 31, 1966

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

FORM IS-52
for
REGISTRATION STATEMENTS OF INDIVIDUALS
Pursuant to section 8 of the Internal
Security Act of 1950

INSTRUCTION SHEET—READ CAREFULLY

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1. All individuals required to register under section 8 of the Internal Security Act of 1950 shall use this form for their registration statements.

2. Two copies of the statement are to be filed. An additional copy of the statement should be prepared and retained by the Registrant for future references.

3. The statement is to be filed with the Internal Security Division, Department of Justice, Washington, D. C.

4. All items of the form are to be answered. Where the answer to an item is "None" or "inapplicable," it should be so stated.

5. Both copies of the statement are to be signed. The making of any willful false statement or the omission of any material fact is punishable under 18 U. S. Code, 1001.

6. If the space provided on the form for the answer to any given item is insufficient, reference shall be made

in such space to a full insert page or pages on which the item number and item shall be restated and the answer given.

FOR AN INDIVIDUAL

a. Who is a member of any Communist-action organization which has failed to file a registration statement as required by Section 7(a) of the Internal Security Act of 1950.

OR

b. Who is a member of any organization which has registered as a Communist-action organization under Section 7(a) of the Internal Security Act of 1950 but which has failed to include the individual's name upon the list of members filed with the Attorney General.

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1. Name of the Communist-action organization of which Registrant was a member within the preceding twelve months.

2.(a) Name of Registrant.

(b) All other names used by Registrant during the past ten years and dates when used.

(c) Date of birth.

(d) Place of birth.

3.(a) Present business address.

(b) Present residence address.

4. If the Registrant is now or has within the past twelve months been an officer of the Communist-action organization listed in response to question number 1:

(a) List all offices so held and the date when held.

(b) Give a description of the duties or functions performed during tenure of office.

The undersigned certifies that he has read the information set forth in this statement, that he is familiar with the contents thereof, and that such contents are in their entirety true and accurate to the best of his knowledge and belief. The undersigned further represents that he is familiar with the provisions of Section 1001, Title 18, U. S. Code (printed at the bottom of this form).*

/s/ ....
(Signature) (Date)

/T/ ....
(Name) (date)
(Print or type)

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*18 U. S. C., Section 1001, provides: Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

MR. JUSTICE CLARK, concurring.

I join in the opinion of the Court. The conclusion it reaches today was forecast in 1948. In response to the request of the Chairman of the Senate Judiciary Committee for an expression of the views of the Department of Justice on H. R. 5852, a precursor of the Act here under attack, it was then pointed out that the "measure might be held . . . even to compel self-incrimination." †

This view was expressed in a letter over my signature as Attorney General which noted that the proposed legislation "would require every Communist political organization and every Communist-front organization to register . . . . In addition to information which would be required of both organizations in common, a Communist political organization would be obliged to disclose the names and addresses of its members in its registration statement. . . . In case of the failure of any organization to register in accordance with the measure, it would be the duty of the executive officer and the secretary of such organization to register in behalf of the organization. . . . A failure to register . . . subjects the organization and certain of its agents to severe penalties." After consideration of other provisions of the bill the letter advised that the Department of Justice had concluded that "the measure might be held (notwithstanding the legislative finding of clear and present danger) to deny freedom of speech, of the press, and of assembly, and even to compel self-incrimination." It also expressed the belief of the Department that "there would not be any voluntary registrations under the measure. Should a Communist organization fail to register, the burden to proceed would shift to the Attorney General . . . to prove that the organization is required to register."

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† Hearings on H. R. 5852 before the Senate Committee on the Judiciary, 80th Cong., 2d Sess., 422 (1948).

As finally passed, the Act imposed a duty to register upon individual members after the refusal of the Communist Party to register and disclose its membership. Though not in H. R. 5852 about which the Department of Justice expressed constitutional doubts, this more pervasive registration requirement directly abridges the privilege of members against self-incrimination. I therefore join in this reversal.

SHUTTLESWORTH *v.* CITY OF BIRMINGHAM.

CERTIORARI TO THE COURT OF APPEALS OF ALABAMA.

No. 5. Argued October 11, 1965.—Decided November 15, 1965.

Petitioner and a group of companions were standing near a street intersection on a Birmingham, Alabama, sidewalk which a policeman thrice requested them to clear for pedestrian passage. After the third request, all but petitioner, who had been questioning the policeman about his order, had begun to walk away and the policeman arrested petitioner. Petitioner was tried before a court without a jury which, without any fact findings or opinion, convicted him of violating two ordinances, §§ 1142 and 1231, of Birmingham's city code. The Alabama Court of Appeals affirmed. Because of their breadth if read literally, these ordinances present grave constitutional problems. In other decisions subsequent to petitioner's conviction, § 1142 was construed by the Alabama Court of Appeals as applicable only to standing, loitering or walking on a street or sidewalk so as to obstruct free passage and refusing to obey an officer's request to move on, and § 1231 was confined to the enforcement of the orders of a traffic officer while directing vehicular traffic. *Held:*

1. The conviction under § 1142 must be set aside in view of the possibility that it was based upon an unconstitutional construction of the ordinance. Pp. 90–92.

2. Since petitioner, when directed to move on, was a pedestrian not around a vehicle and the arresting policeman was not directing traffic, the conviction under § 1231 must fall for lack of any evidence to support the alleged violation. *Thompson* v. *City of Louisville,* 362 U. S. 199, followed. Pp. 93–95.

42 Ala. App. 296, 161 So. 2d 796, reversed and remanded.

James M. Nabrit III argued the cause for petitioner. With him on the brief were *Jack Greenberg, Norman C. Amaker, Peter A. Hall, Orzell Billingsley, Jr.,* and *Anthony G. Amsterdam.*

Earl McBee argued the cause and filed a brief for respondent.

MR. JUSTICE STEWART delivered the opinion of the Court.

The petitioner was brought to trial in the Circuit Court of Jefferson County, Alabama, upon a complaint charging him with violating two sections of the General Code of the City of Birmingham, Alabama.[1] After trial without a jury, the court found him "guilty as charged in the Complaint," and imposed a sentence of imprisonment for 180 days at hard labor and an additional 61 days at hard labor in default of a $100 fine and costs. The judgment of conviction was affirmed by the Alabama Court of Appeals, 42 Ala. App. 296, 161 So. 2d 796, and the Supreme Court of Alabama declined review. 276 Ala. 707, 161 So. 2d 799. We granted certiorari to consider the petitioner's claim that under the Fourteenth Amendment of the United States Constitution his conviction cannot stand. 380 U. S. 905.

The two ordinances which Shuttlesworth was charged with violating are §§ 1142 and 1231 of the Birmingham General City Code. The relevant paragraph of § 1142 provides: "It shall be unlawful for any person or any number of persons to so stand, loiter or walk upon any street or sidewalk in the city as to obstruct free passage over, on or along said street or sidewalk. It shall also be unlawful for any person to stand or loiter upon any street or sidewalk of the city after having been requested by any police officer to move on." Section 1231 provides: "It shall be unlawful for any person to refuse or fail to comply with any lawful order, signal or direction of a police officer." The two counts in the complaint were framed in the words of these ordinances.[2]

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[1] This was a trial *de novo* on appeal from a judgment of conviction in the Recorder's Court of the City of Birmingham.

[2] "Count One

"Comes the City of Birmingham, Alabama, a municipal corporation, and complains that F. L. Shuttlesworth, within twelve months

The evidence was in conflict, but the prosecution's version of the facts can be briefly summarized. On April 4, 1962, at about 10:30 a. m., Patrolman Byars of the Birmingham Police Department observed Shuttlesworth standing on a sidewalk with 10 or 12 companions outside a department store near the intersection of 2d Ave. and 19th St. in the City of Birmingham. After observing the group for a minute or so, Byars walked up and "told them they would have to move on and clear the sidewalk and not obstruct it for the pedestrians." After some, but not all, of the group began to disperse, Byars repeated this request twice. In response to the second request, Shuttlesworth said, "You mean to say we can't stand here on the sidewalk?" After the third request he replied, "Do you mean to tell me we can't stand here in front of this store?" By this time everybody in the group but Shuttlesworth had begun to walk away, and Patrolman Byars told him he was under arrest. Shuttlesworth then responded, "Well, I will go into the store,"

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before the beginning of this prosecution and within the City of Birmingham, or the police jurisdiction thereof, did stand, loiter or walk upon a street or sidewalk within and among a group of other persons so as to obstruct free passage over, on or along said street or sidewalk at, to-wit: 2nd Avenue, North, at 19th Street or did while in said group stand or loiter upon said street or sidewalk after having been requested by a police officer to move on, contrary to and in violation of Section 1142 of the General City Code of Birmingham of 1944, as amended by Ordinance Number 1436-F.

"Count Two

"Comes the City of Birmingham, Alabama, a municipal corporation, and complains that F. L. Shuttlesworth, within twelve months before the beginning of this prosecution and within the City of Birmingham, or the police jurisdiction thereof, did refuse to comply with a lawful order, signal or direction of a police officer, contrary to and in violation of Section 1231 of the General City Code of the City of Birmingham."

and walked into the entrance of the adjacent department store. Byars followed and took him into custody just inside the store's entrance.[3]

I.

On its face, the here relevant paragraph of § 1142 sets out two separate and disjunctive offenses. The paragraph makes it an offense to "so stand, loiter or walk upon any street or sidewalk . . . as to obstruct free passage over, on or along said street or sidewalk." The paragraph makes it "*also* . . . unlawful for any person to stand or loiter upon any street or sidewalk . . . after having been requested by any police officer to move on." (Emphasis added.) The first count of the complaint in this case, tracking the ordinance, charged these two separate offenses in the alternative.[4]

Literally read, therefore, the second part of this ordinance says that a person may stand on a public sidewalk in Birmingham only at the whim of any police officer of that city. The constitutional vice of so broad a provision needs no demonstration.[5] It "does not provide for government by clearly defined laws, but rather for government by the moment-to-moment opinions of a policeman on his beat." *Cox* v. *Louisiana,* 379 U. S. 536, 579 (separate opinion of MR. JUSTICE BLACK). Instinct with its ever-present potential for arbitrarily suppressing First Amendment liberties, that kind of law bears the hallmark of a police state.[6]

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[3] The record contains many references to a so-called "selective buying campaign" in which Birmingham Negroes were engaged at that time. There was no showing, however, of any connection between this campaign and the presence of the petitioner and his companions outside the department store on the morning of his arrest.

[4] See note 2, *supra.*

[5] *Thornhill* v. *Alabama,* 310 U. S. 88, 97; *NAACP* v. *Button,* 371 U. S. 415, 433, 435; Amsterdam, Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67, 75–81, 96–104 (1960). Cf. *Smith* v. *California,* 361 U. S. 147, 151; *Baggett* v. *Bullitt,* 377 U. S. 360, 371.

The matter is not one which need be exhaustively pursued, however, because, as the respondent correctly points out, the Alabama Court of Appeals has not read § 1142 literally, but has given to it an explicitly narrowed construction. The ordinance, that court has ruled, "is directed at obstructing the free passage over, on or along a street or sidewalk by the manner in which a person accused stands, loiters or walks thereupon. Our decisions make it clear that the mere refusal to move on after a police officer's requesting that a person standing or loitering should do so is not enough to support the offense. . . . [T]here must also be a showing of the accused's blocking free passage . . . ." *Middlebrooks* v. *City of Birmingham*, 42 Ala. App. 525, 527, 170 So. 2d 424, 426.

The Alabama Court of Appeals has thus authoritatively ruled that § 1142 applies only when a person who stands, loiters, or walks on a street or sidewalk so as to obstruct free passage refuses to obey a request by an officer to move on. It is our duty, of course, to accept this state judicial construction of the ordinance. *Winters* v. *New York,* 333 U. S. 507; *United States* v. *Burnison,* 339 U. S. 87; *Aero Mayflower Transit Co.* v. *Board of Railroad Comm'rs,* 332 U. S. 495. As so construed, we cannot say that the ordinance is unconstitutional, though it requires no great feat of imagination to envisage situations in which such an ordinance might be unconstitutionally applied.

The present limiting construction of § 1142 was not given to the ordinance by the Alabama Court of Appeals, however, until its decision in *Middlebrooks, supra,* two years after the petitioner's conviction in the present case.[7] In *Middlebrooks* the Court of Appeals stated that it had applied its narrowed construction of the ordinance in affirming Shuttlesworth's conviction, but its opinion in the present case, 42 Ala. App. 296, 161 So. 2d 796, nowhere makes explicit any such construction. In any event, the trial court in the present case was without guidance from any state appellate court as to the meaning of the ordinance.

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[6] *Lovell* v. *City of Griffin,* 303 U. S. 444, 451; *Kunz* v. *New York,* 340 U. S. 290, 293; *Schneider* v. *State,* 308 U. S. 147, 163–164.

The trial court made no findings of fact and rendered no opinion. For all that appears, that court may have found the petitioner guilty only by applying the literal—and unconstitutional—terms of the ordinance. Upon the evidence before him, the trial judge as finder of the facts might easily have determined that the petitioner had created an obstruction, but had subsequently moved on. The court might alternatively have found that the petitioner himself had created no obstruction, but had simply disobeyed Patrolman Byars' instruction to move on. In either circumstance the literal terms of the ordinance would apply; in neither circumstance would the ordinance be applicable as now construed by the Alabama Court of Appeals. Because we are unable to say that the Alabama courts in this case did not judge the petitioner by an unconstitutional construction of the ordinance, the petitioner's conviction under § 1142 cannot stand.

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[7] The petitioner's trial took place in October 1962. The Alabama Court of Appeals affirmed the judgment of conviction in November 1963. The *Middlebrooks* case was decided in October 1964. 42 Ala. App. 525, 170 So. 2d 424. The *Middlebrooks* construction of the ordinance was adumbrated in *Smith* v. *City of Birmingham,* decided the same day. 42 Ala. App. 467, 168 So. 2d 35.

II.

We find the petitioner's conviction under the second count of the complaint, for violation of § 1231 of the General City Code, to be constitutionally invalid for a completely distinct reason. That ordinance makes it a criminal offense for any person "to refuse or fail to comply with any lawful order, signal or direction of a police officer." Like the provisions of § 1142 discussed above, the literal terms of this ordinance are so broad as to evoke constitutional doubts of the utmost gravity. But the Alabama Court of Appeals has confined this ordinance to a relatively narrow scope. In reversing the conviction of the petitioner's codefendant, the court said of § 1231: "This section appears in the chapter regulating vehicular traffic, and provides for the enforcement of the orders of the officers of the police department in directing such traffic." *Phifer* v. *City of Birmingham,* 42 Ala. App. 282, 285, 160 So. 2d 898, 901.[8]

The record contains no evidence whatever that Patrolman Byars was directing vehicular traffic at the time he told the petitioner and his companions to move on. Whatever Patrolman Byars' other generally assigned duties may have been,[9] he testified unambiguously that he directed the petitioner's group to move on, to "clear the sidewalk and not obstruct it for the pedestrians." [10]

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[8] Cf. *Shelton* v. *City of Birmingham,* 42 Ala. App. 371, 165 So. 2d 912, affirming the conviction of a defendant who refused to obey an officer's direction to get out of the middle of a street which had been closed to private vehicles and in which "[p]olice cars and fire engines were being used to move and quiet the crowd."

[9] Patrolman Byars testified that on the morning in question he was a "utility officer," and that as such he was "in charge of the direction and movement of all traffic at 3rd Avenue and 19th Street and four blocks in an east, west, north and south direction." He conceded that he was "not regularly placed" at the intersection where the arrest occurred, and that he had "nothing to do with the other officers who were also there."

Five years ago this Court decided the case of *Thompson* v. *City of Louisville,* 362 U. S. 199. There we reversed the conviction of a man who had been found guilty in the police court of Louisville, Kentucky, of loitering and disorderly conduct. The proposition for which that case stands is simple and clear. It has nothing to do with concepts relating to the weight or sufficiency of the evidence in any particular case. It goes, rather, to the most basic concepts of due process of law. Its application in Thompson's case turned, as MR. JUS-

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[10] The record shows that the officer directing vehicular traffic at the intersection of 2d Ave. and 19th St. at the time of the petitioner's arrest was Officer Hallman. His relevant testimony was as follows:

"Q. Now, you observe on these corners from your position here when you police that corner, do you not?

"A. I try to.

"Q. Had you seen these people over there blocking traffic before you saw Officer Byars?

"A. I saw him standing over there talking to them.

"Q. Did you see them before he was talking to them?

"A. I saw them over there. I didn't pay any particular attention to them.

"Q. Did you get the impression they were waiting for the light to change?

"A. I couldn't answer that because I don't know what they had on their mind.

"Q. You formed no impression when you first saw them?

"A. No.

"Q. You took no note of them when you first saw them, is that right?

"A. Just saw them standing over there.

"Q. The only time you made note of them standing over there was when you saw the policeman assisting you talking to them?

"A. When I saw him over there talking to them. He wasn't assisting me.

"Q. He wasn't assisting you with your corner.

"A. No."

TICE BLACK pointed out, "not on the sufficiency of the evidence, but on whether this conviction rests upon any evidence at all." 362 U. S., at 199. The Court found there was "no evidence whatever in the record to support these convictions," and held that it was "a violation of due process to convict and punish a man without evidence of his guilt." 362 U. S., at 206. See also *Garner* v. *Louisiana,* 368 U. S. 157.

No more need be said in this case with respect to the petitioner's conviction for violating § 1231 of the General Code of the City of Birmingham, Alabama. Quite simply, the petitioner was not in, on, or around any vehicle at the time he was directed to move on or at the time he was arrested. He was a pedestrian. Officer Byars did not issue any direction to the petitioner in the course of directing vehicular traffic, because Officer Byars was not then directing any such traffic. There was thus no evidence whatever in the record to support the petitioner's conviction under this ordinance as it has been authoritatively construed by the Alabama Court of Appeals. It was a violation of due process to convict and punish him without evidence of his guilt.

For these reasons the judgment is reversed and the case is remanded to the Court of Appeals of Alabama for proceedings not inconsistent with this opinion.

Reversed and remanded.

MR. JUSTICE DOUGLAS, concurring.

I join Part II of the Court's opinion but would reverse on Count I for a somewhat different reason. The police power of a municipality is certainly ample to deal with all traffic conditions on the streets—pedestrian as well as vehicular. So there could be no doubt that if petitioner were one member of a group obstructing a sidewalk he could, pursuant to a narrowly drawn ordinance, be asked to move on and, if he refused, be arrested for the obstruction. But in this case the testimony is that the group dissolved when warned by the police, save only the petitioner.* At the time of the arrest petitioner was no longer blocking traffic. Section 1142 of the Birmingham General Code makes it unlawful to "obstruct the free passage of persons on . . . sidewalks." The ordinance, as it has been construed by the Alabama Court of Appeals, has been held to apply only to one who continues to block a sidewalk *after a police warning to move.* *Middlebrooks* v. *City of Birmingham,* 42 Ala. App. 525, 527, 170 So. 2d 424, 426. There was no such "obstructing" here, unless petitioner's presence on the street was itself enough. Failure to obey such an order, when one is not acting unlawfully, certainly cannot be made a crime in a country where freedom of locomotion (*Edwards* v. *California,* 314 U. S. 160) is honored. For these reasons I think there was no evidence, within the meaning of *Thompson* v. *City of Louisville,* 362 U. S. 199, to sustain the conviction and hence I would reverse the judgment outright.

APPENDIX TO OPINION OF MR. JUSTICE DOUGLAS.

Officer Robert L. Byars, who made the arrest, testified on cross-examination as follows:

"Q. How many persons were standing there at that intersection when you first observed it?

"A. Some ten or twelve.

"Q. Were they all colored or white people, or altogether or what?

"A. I didn't pay particular notice to the race.

"Q. You stood there a minute or minute and a half and then you went out and cleared the intersection?

"A. I went out and asked them to move.

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*See Appendix hereto.

"Q. Was that great big crowd out there and the intersection completely blocked? You testified you had half of the south-north cross walk free, that the defendants were not blocking half of the south-north cross walk, they were standing in the west part of the cross walk where they should be standing assuming they were going south, they were not blocking the east-west cross walk at all? Now, where was the crowd that was blocking?

"A. They were all standing on the sidewalk.

"Q. You mean the crowd?

"A. That's right, including the defendant.

"Q. Now, you placed the defendants where you have the X. Now, the crowd is what we are interested in now, the crowd they were blocking, where were they?

"Mr. Walker: We object. There has been no testimony that there was a crowd that was being blocked; the testimony is there was a crowd blocking the moving traffic.

"Q. Are these defendants charged then with assembling the crowd or something? Who were they blocking? Where were the persons they were blocking, these two defendants here?

"A. They were blocking half of the sidewalk causing the people walking east to go into the street around them.

"Q. The people walking east along what street?

"A. Along 2nd Avenue.

"Q. Along this way (indicating)?

"A. That's right.

"Q. The people walking along 2nd Avenue from west to east had to go around them?

"A. That is true.

"Q. While they stood there?

"A. That is true.

"Q. And you observed that for a minute or minute and a half?

"A. That is true.

"Q. And then you went out and you required them to move on. Did you speak directly to the Defendant Shuttlesworth?

"A. I spoke to the people standing assembled there.

"Q. They all moved but him, is that correct?

"A. Not on the first request they didn't all move. Some began to move.

"Q. Well, all had moved by the time you made the arrest?

"A. Except Shuttlesworth.

"Q. Nobody was standing there but Shuttlesworth?

"A. Nobody was standing; everybody else was in motion except the Defendant Shuttlesworth, who had never moved.

"Q. Was he talking to you during this time?

"A. He made a statement to me on two occasions when I informed him to move on on three occasions.

"Q. Did he ask you where you wanted him to move?

"A. No.

"Q. Did you tell him where to move?

"A. I did not.

"Q. You didn't arrest anybody but Shuttlesworth?

"A. Not at that time." (R. 27–28.)

Officer C. W. Hallman, who observed the above after having been called over by Officer Byars, testified on direct examination as follows:

"Q. About how many was in the group at that time, if you know?

"A. I would say five or six. It could have been more or less.

"Q. What happened to the group then, if anything?

"A. All of them dispersed except Shuttlesworth.

"Q. What happened after that?

"A. Officer Byars told him he was under arrest for blocking the sidewalk and placed him under arrest." (R. 59–60.)

MR. JUSTICE BRENNAN, concurring.

I join the Court's opinion on my understanding that *Middlebrooks* v. *City of Birmingham* is being read as holding that § 1142 applies only when a person (a) stands, loiters or walks on a street or sidewalk so as to obstruct free passage, (b) is requested by an officer to move on, and (c) thereafter continues to block passage by loitering or standing on the street. It is only this limiting construction which saves the statute from the constitutional challenge that it is overly broad. Moreover, because this construction delimits the statute to "the sort of 'hard-core' conduct that would obviously be prohibited under any construction," *Dombrowski* v. *Pfister*, 380 U. S. 479, 491–492, it may be legitimately applied to such conduct occurring before that construction.

MR. JUSTICE FORTAS, with whom THE CHIEF JUSTICE joins, concurring.

I agree that Shuttlesworth's conviction must be set aside. But I am concerned lest the opinion of the Court be considered as indicating that Shuttlesworth can constitutionally be convicted of violating the General Code of the City of Birmingham, Alabama, on the facts here presented. Any such conviction would violate basic constitutional guaranties. I would make this clear now.

The Court's opinion does not challenge the constitutionality of § 1142 of the Birmingham Code as that section was construed by the Alabama Court of Appeals two years after Shuttlesworth's conviction. The opinion may be read to imply that if Shuttlesworth is now put to trial for violation of § 1142, as construed, the vice of the present conviction may be eliminated. I would make it clear that the Federal Constitution forbids a conviction on the facts of this record, regardless of the validity of the ordinance involved.

I agree that, as construed by Alabama two years after Shuttlesworth was convicted, § 1142 cannot be held unconstitutional on its face. I agree that if there were a rational basis for charging Shuttlesworth with violating the section as so construed, he could be retried if Alabama should choose so vigorously to protect the sidewalks of Birmingham. Civil rights leaders, like all other persons, are subject to the law and must comply with it. Their calling carries no immunity. Their cause confers no privilege to break or disregard the law.

But there is here no possible basis for a conviction which would be valid under the Federal Constitution. The accused provision would be unconstitutional as applied to Shuttlesworth's facts even after the plastic surgery by Alabama's Court of Appeals in 1964. *Middlebrooks* v. *City of Birmingham,* 42 Ala. App. 525, 170 So. 2d 424.[1] A revision of the formula does not and cannot change the facts; and those facts do not permit the State to jail Shuttlesworth for his actions on April 4, 1962.

Taking the prosecution's version of the facts, it appears that Shuttlesworth was one of a group of 8, 10 or 12[2] persons who at 10:30 a.m. on April 4, 1962, were accosted by a patrolman after they had stood for a minute or a minute and a half at 19th Street and 2d Avenue in Birmingham. They occupied one-half of the sidewalk. They were conversing among themselves. There is no suggestion of disorder or of deliberate obstruction of pedestrian traffic. After the first command by the patrolman, the group commenced to move away. The officer repeated his command, and Shuttlesworth said, "You mean to say we can't stand here on the sidewalk?" After the third command, Shuttlesworth said, "Do you mean to tell me we can't stand here in front of this store?" The officer then told Shuttlesworth he was under arrest. Shuttlesworth said he would go into the store. The officer followed and arrested him. There was no resistance. By this time everybody in the group except Shuttlesworth had moved away. The entire incident took less than four and one-half minutes, from arrival of Shuttlesworth and his friends at the corner to his arrest.

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[1] As the Court's opinion herein points out, in *Middlebrooks,* the Court of Appeals stated that its narrowed construction of the ordinance had been the "ratio decidendi" of *Shuttlesworth,* decided a year earlier. But there is no indication of this in *Shuttlesworth* itself.

[2] Officer Renshaw testified there were 8, 10 or 12 people in the group (R. 40). Officer Byars testified to 10 or 12 (R. 17).

For this, Shuttlesworth was tried, convicted and sentenced to spend half a year at hard labor and to pay a fine of $100.

In my view, there is nothing in the facts which justified an arrest and conviction. Prior to the officer's command the situation was that a small group of people occupying one-half of the sidewalk were engaged in orderly conversation. Promptly upon the officer's command, the group began to disperse and only Shuttlesworth remained. He, alone, cannot be held to have blocked the sidewalk. His rhetorical questions may have irritated the patrolman; but a policeman's lot is not a happy one—and certainly, in context, Shuttlesworth's questions did not rise to the magnitude of an offense against the laws of Alabama. If one were to confine oneself to the surface version of the facts, a general alarm for the people of Birmingham would be in order. Their use of the sidewalks would be hazardous beyond measure.

But this, of course, is fiction. It is facade for a narrower, but no less disagreeable, truth. On April 4, 1962, the Negroes of Birmingham were engaged in a "selective buying campaign"—an attempted boycott—of Birmingham's stores for the purpose of protesting discrimination against them. Shuttlesworth and his companions were

Negroes.[3] They were standing in front of a department store. Shuttlesworth, as an officer who participated in the arrest testified, was a "notorious" person in the field of civil rights in Birmingham.[4]

In my view the net effect of the facts in this case is inescapable. Shuttlesworth's arrest was an incident in the tense racial conflict in Birmingham. This may explain the arrest, but it adds nothing to its lawfulness. There is no basis in the facts and circumstances of the case for charging that Shuttlesworth was "blocking free passage" on the sidewalk, *Middlebrooks, supra,* at 527, 170 So. 2d, at 426, or that he culpably refused to obey an order of an officer to move on, or remained after such an order so as to justify arrest, trial or conviction. Any attempt to punish Shuttlesworth in these circumstances would, in my view, violate the Fourteenth Amendment of the Federal Constitution.

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[3] Testimony of Officer Renshaw (R. 49). Officer Byars testified that he didn't know what color they were (R. 27, 36).

[4] The principal arresting officer testified that he did not recognize Shuttlesworth, but he had seen his picture on television. He had heard of him, had read that he had frequently been arrested, and that he had been in the Birmingham jail. Shuttlesworth's walk on April 4, 1962, started during a recess in a federal court civil rights trial in which he was involved. The trial had been publicized.

BRADLEY ET AL. *v.* SCHOOL BOARD OF CITY OF RICHMOND ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 415. Decided November 15, 1965.*

The lower court approved school desegregation plans for Hopewell and Richmond, Virginia, without full inquiry into petitioners' contention that faculty allocation on an alleged racial basis invalidated the plans. *Held:* Petitioners were entitled to full evidentiary hearings on their contention, and such hearings should be held without delay.

Certiorari granted; 345 F. 2d 310; 345 F. 2d 325, judgments vacated and remanded.

Jack Greenberg, James M. Nabrit III, S. W. Tucker and *Henry L. Marsh III* for petitioners in both cases.

J. Elliott Drinard and *Henry T. Wickham* for respondents in No. 415. *Frederick T. Gray* for respondents in No. 416.

PER CURIAM.

The petitions for writs of certiorari to the Court of Appeals for the Fourth Circuit are granted for the purpose of deciding whether it is proper to approve school desegregation plans without considering, at a full evidentiary hearing, the impact on those plans of faculty allocation on an alleged racial basis. We hold that the Court of Appeals erred in both these cases in this regard, 345 F. 2d 310, 319–321; 345 F. 2d 325, 328.

Plans for desegregating the public school systems of Hopewell and Richmond, Virginia, were approved by the

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*Together with No. 416, *Gilliam et al.* v. *School Board of City of Hopewell et al.,* also on petition for writ of certiorari to the same court.

District Court for the Eastern District of Virginia without full inquiry into petitioners' contention that faculty allocation on an alleged racial basis rendered the plans inadequate under the principles of *Brown* v. *Board of Education,* 347 U. S. 483. The Court of Appeals, while recognizing the standing of petitioners, as parents and pupils, to raise this contention, declined to decide its merits because no evidentiary hearings had been held on this issue. But instead of remanding the cases for such hearings prior to final approval of the plans, the Court of Appeals held that "[w]hether and when such an inquiry is to be had are matters with respect to which the District Court . . . has a large measure of discretion," and it reasoned as follows:

> "When direct measures are employed to eliminate all direct discrimination in the assignment of pupils, a District Court may defer inquiry as to the appropriateness of supplemental measures until the effect and the sufficiency of the direct ones may be determined. The possible relation of a reassignment of teachers to protection of the constitutional rights of pupils need not be determined when it is speculative. When all direct discrimination in the assignment of pupils has been eliminated, assignment of teachers may be expected to follow the racial patterns established in the schools. An earlier judicial requirement of general reassignment of all teaching and administrative personnel need not be considered until the possible detrimental effects of such an order upon the administration of the schools and the efficiency of their staffs can be appraised along with the need for such an order in aid of protection of the constitutional rights of pupils." 345 F. 2d, at 320–321.

We hold that petitioners were entitled to such full evidentiary hearings upon their contention. There is no merit to the suggestion that the relation between faculty allocation on an alleged racial basis and the adequacy of the desegregation plans is entirely speculative. Nor can we perceive any reason for postponing these hearings: Each plan had been in operation for at least one academic year; these suits had been pending for several years; and more than a decade has passed since we directed desegregation of public school facilities "with all deliberate speed," *Brown* v. *Board of Education,* 349 U. S. 294, 301. Delays in desegregating school systems are no longer tolerable. *Goss* v. *Board of Education,* 373 U. S. 683, 689; *Calhoun* v. *Latimer,* 377 U. S. 263, 264–265; see *Watson* v. *City of Memphis,* 373 U. S. 526.

The judgments of the Court of Appeals are vacated and the cases are remanded to the District Court for evidentiary hearings consistent with this opinion. We, of course, express no views of the merits of the desegregation plans submitted, nor is further judicial review precluded in these cases following the hearings.

Vacated and remanded.

ALABAMA HIGHWAY EXPRESS, INC., ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA.

No. 447. Decided November 15, 1965.

241 F. Supp. 290, affirmed.

James W. Wrape and *Robert E. Joyner* for appellants.

Solicitor General Marshall, Assistant Attorney General Turner, Robert B. Hummel, Robert W. Ginnane and *Robert S. Burk* for the United States et al.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.

BURNHAM VAN SERVICE ET AL. *v.* PENTECOST ET AL.

APPEAL FROM THE SUPREME COURT OF TENNESSEE.

No. 494. Decided November 15, 1965.

Appeal dismissed.

J. G. Lackey, Jr., for appellants.

George F. McCanless, Attorney General of Tennessee, and *Milton P. Rice*, Assistant Attorney General, for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

MICHIGAN BELL TELEPHONE CO. *v.* CITY OF DETROIT.

APPEAL FROM THE SUPREME COURT OF MICHIGAN.

No. 497. Decided November 15, 1965.*

374 Mich. 543, 132 N. W. 2d 660, appeals dismissed and certiorari denied.

Thomas G. Long, *James M. Smith* and *Donald E. Brown* for appellant in No. 497. *Harvey A. Fischer* and *Richard Ford* for appellant in No. 498.

John H. Witherspoon for appellee.

PER CURIAM.

The motions to dismiss are granted and the appeals are dismissed for want of jurisdiction. Treating the papers whereon the appeals were taken as petitions for writs of certiorari, certiorari is denied.

FERNANDEZ *v.* BABARE ET UX.

APPEAL FROM THE SUPREME COURT OF OREGON.

No. 610, Misc. Decided November 15, 1965.

Appeal dismissed.

Howard R. Lonergan for appellant.

PER CURIAM.

The appeal is dismissed for want of a substantial federal question.

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*Together with No. 498, *Detroit Edison Co.* v. *City of Detroit*, also on appeal from the same court.

ADELMAN ET AL. *v.* LOWER MINNESOTA RIVER WATERSHED DISTRICT.

APPEAL FROM THE SUPREME COURT OF MINNESOTA.

No. 512. Decided November 15, 1965.

271 Minn. 216, 135 N. W. 2d 670, appeal dismissed and certiorari denied.

Thomas E. Ticen for appellants.

Raymond A. Haik for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

WILSON *v.* COMMISSIONER OF INTERNAL REVENUE.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 520. Decided November 15, 1965.

340 F. 2d 609, appeal dismissed and certiorari denied.

Appellant *pro se*.

Solicitor General Marshall, Acting Assistant Attorney General Roberts and *Melva M. Graney* for appellee.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

HAINSWORTH *v.* MARTIN, SECRETARY OF STATE OF TEXAS, ET AL.

APPEAL FROM THE SUPREME COURT OF TEXAS.

No. 477. Decided November 15, 1965.

Judgment of Court of Civil Appeals of Texas, Third Supreme Judicial District, 386 S. W. 2d 202, vacated and remanded to that court.

Robert W. Hainsworth, appellant, *pro se*.

Waggoner Carr, Attorney General of Texas, and *Hawthorne Phillips*, *Pat Bailey* and *Mary K. Wall*, Assistant Attorneys General, for appellees.

PER CURIAM.

This cause having become moot in the light of the enactment of the Texas Apportionment Act of 1965, the judgment of the Court of Civil Appeals, Third Supreme Judicial District of Texas, is vacated, and the cause is remanded for such proceedings as by that court may be deemed appropriate.

MR. JUSTICE HARLAN and MR. JUSTICE STEWART would dismiss the appeal for want of a substantial federal question.

MR. JUSTICE FORTAS took no part in the consideration or decision of this case.

ROSENBLATT *v.* AMERICAN CYANAMID CO.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 501. Decided November 15, 1965.

Appeal dismissed.

E. Barrett Prettyman, Jr., and *Thomas J. O'Toole* for appellant.

PER CURIAM.

The appeal is dismissed for want of a substantial federal question.

MR. JUSTICE HARLAN took no part in the consideration or decision of this case.

SWIFT & CO., INC., ET AL. *v.* WICKHAM, COMMISSIONER OF AGRICULTURE & MARKETS OF NEW YORK.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 9. Argued October 13, 1965.—Decided November 22, 1965.

Appellants, two meat-packing companies, sued in the Federal District Court to enjoin enforcement of a New York statute requiring that the label for packaged poultry disclose the weight of the unstuffed bird as well as of the entire package. Appellants claimed that the state statute violated the Commerce Clause, the Fourteenth Amendment, and overriding federal labeling requirements under which the state label had been disapproved. A three-judge District Court was convened under 28 U. S. C. § 2281, providing for such a tribunal whenever the enforcement of a state statute is sought to be enjoined "upon the ground of the unconstitutionality of such statute." That court dismissed on the merits in both its single-judge and three-judge capacities, and appeals were taken respectively to the Court of Appeals and (under 28 U. S. C. § 1253) to this Court. *Held:* The three-judge court requirement applies to injunction suits depending directly upon a substantive provision of the Constitution and does not apply to Supremacy Clause cases involving only federal-state statutory conflicts. Pp. 114–129.

(a) Appellants' Commerce Clause and Fourteenth Amendment claims are too insubstantial to support three-judge court jurisdiction. Pp. 114–115.

(b) A claim that a state statute is pre-empted by or in conflict with a federal provision though grounded in the Supremacy Clause primarily involves the comparison of two statutes, rather than the interpretation of the Constitution; therefore, as established in *Ex parte Buder,* 271 U. S. 461; *Ex parte Bransford,* 310 U. S. 354; and *Case* v. *Bowles,* 327 U. S. 92, Supremacy Clause cases are not within the purview of § 2281. Pp. 120–122.

(c) The holding in *Kesler* v. *Department of Public Safety,* 369 U. S. 153, that a three-judge court is required if the constitutional issue is "immediately" apparent but not if substantial statutory construction is required, is unworkable, and that decision is *pro tanto* overruled. Pp. 124–129.

230 F. Supp. 398, appeal dismissed.

William J. Condon argued the cause for appellants. With him on the brief were *William J. Colavito, William P. Woods, Arthur C. O'Meara, Earl G. Spiker* and *Edmund L. Jones.*

Samuel A. Hirshowitz, First Assistant Attorney General of New York, argued the cause for appellee. With him on the brief were *Louis J. Lefkowitz,* Attorney General, and *Philip Kahaner, Lester Esterman* and *Joel Lewittes,* Assistant Attorneys General.

Joseph O. Parker and *L. Alton Denslow* filed a brief for the Institute of American Poultry Industries, as *amicus curiae,* urging reversal.

Solicitor General Marshall, Assistant Attorney General Douglas, Jack S. Levin, Sherman L. Cohn and *Richard S. Salzman* filed a brief for the United States, as *amicus curiae,* urging affirmance.

MR. JUSTICE HARLAN delivered the opinion of the Court.

Appellants, the Swift and Armour Companies, stuff, freeze, and package turkeys which they ship to retailers throughout the country for ultimate sale to consumers. Each package is labeled with the net weight of the particular bird (including stuffing) in conformity with a governing federal statute, the Poultry Products Inspection Act of 1957, 71 Stat. 441, 21 U. S. C. §§ 451–469 (1964 ed.), and the regulations issued under its authority by the Secretary of Agriculture.[1] Many of these turkeys are

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[1] Section 457 (b) declares:

"The use of any written, printed or graphic matter upon or accompanying any poultry product inspected or required to be sold in New York. Section 193 of New York's Agriculture and Markets Law[2] has been interpreted through regulations and rulings to require that these packaged turkeys be sold with labels informing the public of the weight of the unstuffed bird as well as of the entire package. Because the amount of stuffing varies with each bird, the State thus seeks to help purchasers ascertain just how much fowl is included in each ready-for-the-oven turkey.

Swift and Armour requested permission of the Poultry Products Section of the Department of Agriculture to change their labels in order to conform with New York's requirements, but such permission was refused at the initial administrative level and no administrative review of that refusal was sought. Swift and Armour

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inspected pursuant to the provisions of this chapter or the container thereof which is false or misleading in any particular is prohibited."

Section 458 (d) prohibits "Using in commerce, or in a designated major consuming area, a false or misleading label on any poultry product."

The Secretary of Agriculture is authorized by § 463 to issue regulations. 7 CFR § 81.125 requires containers to bear "approved labels"; § 81.130 (a)(3) declares that labels must include the net weight of the contents and that "The net weight marked on containers of poultry products shall be the net weight of the poultry products and shall not include the weights of the wet or dry packaging materials and giblet wrapping materials."

[2] Section 193-3 provides:

"All food and food products offered for sale at retail and not in containers shall be sold or offered for sale by net weight, standard measure or numerical count under such regulations as may be prescribed by the commissioner."

Net weight was not defined in the regulation, 1 NYCRR § 221.40 (now § 221.9 (c)), but "[t]he Director of the Bureau of Weights and Measures of the Department testified that he interpreted the regulation, as applied to stuffed turkeys, to require statement of the net weight both of the unstuffed and of the stuffed bird, and that, when asked, he so advised local sealers of weights and measures." *Swift & Co.* v. *Wickham,* 230 F. Supp. 398, 401 (1964).

then brought this federal action to enjoin the Commissioner of Agriculture and Markets of New York from enforcing the State's labeling provisions, asserting that enforcement would violate the Commerce Clause and the Fourteenth Amendment of the Federal Constitution and overriding requirements of the federal poultry enactment.

Pursuant to appellants' request, a three-judge district court was constituted under 28 U. S. C. § 2281 (1958 ed.), which provides for such a tribunal whenever the enforcement of a state statute is sought to be enjoined "upon the ground of the unconstitutionality of such statute." The District Court, unsure of its jurisdiction for reasons appearing below, dismissed the suit on the merits [3] acting both in a three-judge and single-judge capacity.[4] Appeals were lodged in the Court of Appeals for the Second Circuit from the single-judge determination, and in this Court from the three-judge decision in accordance with the direct appeal statute, 28 U. S. C. § 1253 (1964 ed.). The threshold question before us, the consideration of which we postponed to the merits (379 U. S. 997), is whether this Court, rather than the Court of Appeals, has jurisdiction to review the District Court determination, and this in turn depends on whether a three-judge court was required. We hold that it was not.

At the outset, we agree with the District Court that the Commerce Clause and Fourteenth Amendment claims alleged in the complaint are too insubstantial to support the jurisdiction of a three-judge court. It has long been held that no such court is called for when the alleged constitutional claim is insubstantial, *Ex parte Poresky,* 290 U. S. 30; *California Water Service Co.* v. *City of Redding,* 304 U. S. 252. Since the only remaining basis put forth for enjoining enforcement of the state enactment was its asserted repugnancy to the federal statute, the District Court was quite right in concluding that the question of a three-judge court turned on the proper application of our 1962 decision in *Kesler* v. *Department of Public Safety,* 369 U. S. 153. There we decided that in suits to restrain the enforcement of a state statute allegedly in conflict with or in a field pre-empted by a federal statute, § 2281 comes into play only when the Supremacy Clause of the Federal Constitution is immediately drawn in question, but not when issues of federal or state statutory construction must first be decided even though the Supremacy Clause may ultimately be implicated. Finding itself unable to say with assurance whether its resolution of the merits of this case involved *less* statutory construction than had taken place in *Kesler,* the District Court was left with the puzzling question how much *more* statutory construction than occurred in *Kesler* is necessary to deprive three judges of their jurisdiction.

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[3] The court below rejected appellants' Commerce Clause and Fourteenth Amendment arguments, held that there had been no federal pre-emption of this field of regulation, and, though implying strongly that the New York labeling requirements did not conflict with federal requirements, held that this question should first be passed upon at a higher federal administrative level.

[4] The three-judge court dismissed the complaint "certifying out of abundant caution" that the original district judge, also a member of the three-judge panel, "individually arrived at the same conclusion." 230 F. Supp., at 410. This procedure for minimizing prejudice to litigants when the jurisdiction of a three-judge court is unclear has been used before, see *Query* v. *United States*, 316 U. S. 486.

It might suffice to dispose of the three-judge court issue for us to hold, in agreement with what the District Court indicated, 230 F. Supp., at 410, that this case involves so much more statutory construction than did *Kesler* that a three-judge court was inappropriate. (We would indeed find it difficult to say that *less* or no more statutory construction was involved here than in *Kesler* and that therefore under that decision a three-judge court was necessary.) We think, however, that such a disposition of this important jurisdictional question would be less than satisfactory, that candor compels us to say that we find the application of the *Kesler* rule as elusive as did the District Court, and that we would fall short in our responsibilities if we did not accept this opportunity to take a fresh look at the problem. We believe that considerations of *stare decisis* should not deter us from this course. Unless inexorably commanded by statute, a procedural principle of this importance should not be kept on the books in the name of *stare decisis* once it is proved to be unworkable in practice; the mischievous consequences to litigants and courts alike from the perpetuation of an unworkable rule are too great. For reasons given in this opinion, we have concluded that the *Kesler* doctrine in this area of § 2281 is unsatisfactory, and that *Kesler* should be *pro tanto* overruled. The overruling of a six-to-two decision [5] of such recent vintage, which was concurred in by two members of the majority in the present case,[6] and the opinion in support of which was written by an acknowledged expert in the field of federal jurisdiction, demands full explication of our reasons.

I.

The three-judge district court is a unique feature of our jurisprudence, created to alleviate a specific discontent within the federal system. The antecedent of § 2281 was a 1910 Act [7] passed to assuage growing popular displeasure with the frequent grants of injunctions by federal courts against the operation of state legislation regulating railroads and utilities in particular.[8] The federal courts of the early nineteenth century had occasionally issued injunctions at the behest of private litigants against state officials to prevent the enforcement of state statutes,[9] but such cases were rare and generally of a character that did not offend important state policies. The advent of the Granger and labor movements in the late nineteenth century,[10] and the acceleration of state social legislation especially through the creation of regulatory bodies met with opposition in the federal judiciary. In *Chicago, M. & St. P. R. Co.* v. *Minnesota,* 134 U. S. 418, this Court held that the setting of rates not permitting a fair return violated the Due Process Clause of the Fourteenth Amendment. *Ex parte Young,* 209 U. S. 123, established firmly the corollary that inferior federal courts could enjoin state officials from enforcing such unconstitutional state laws.

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[5] Mr. Justice Whittaker took no part in the decision of the case.

[6] MR. JUSTICE BRENNAN and the present writer were included in the *Kesler* majority.

[7] Act of June 18, 1910, c. 309, § 17, 36 Stat. 557.

[8] See Currie, The Three-Judge District Court in Constitutional Litigation, 32 U. Chi. L. Rev. 1, 3-9 (1964); Hutcheson, A Case for Three Judges, 47 Harv. L. Rev. 795 (1934); Warren, Federal

This confrontation between the uncertain contours of the Due Process Clause and developing state regulatory

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and State Court Interference, 43 Harv. L. Rev. 345 (1930). For more contemporary accounts see, *e. g.,* Baldwin, Presidential Address: The Progressive Unfolding of the Powers of the United States, VI Am. Pol. Sci. Rev. 1, 8–9 (1912); Scott, The Increased Control of State Activities by the Federal Courts, III Am. Pol. Sci. Rev. 347 (1909). Although various types of state legislation were being challenged in injunctive suits, see Lockwood, Maw, and Rosenberry, The Use of the Federal Injunction in Constitutional Litigation, 43 Harv. L. Rev. 426 (1930), most numerous and prominent were the railroad cases. Senator Overman noted that ". . . nine out of ten of the cases where application for an injunction has been made to test the constitutionality of state statutes have been railroad cases." 45 Cong. Rec. 7254 (1910).

[9] *E. g., Spooner* v. *McConnell,* 22 Fed. Cas. 939 (No. 13245) (1838).

[10] See S. J. Buck, The Granger Movement, esp. 194–214, 231–237 (1913); Jackson, The Struggle for Judicial Supremacy 48–68 (1949); 2 Warren, The Supreme Court in United States History 574–599 (1935). For the related story of the use of the equity power in the labor field, see Frankfurter and Greene, The Labor Injunction (1930).

legislation, arising in district courts that were generally considered unsympathetic to the policies of the States, had severe repercussions. Efforts were made in Congress to limit in various ways the jurisdiction of federal courts in these sensitive areas.[11] State officials spoke out against the obstruction and delay occasioned by these federal injunction suits.[12] The sponsor of the bill establishing the three-judge procedure for these cases, Senator Overman of North Carolina, noted:

> "[T]here are 150 cases of this kind now where one federal judge has tied the hands of the state officers, the governor, and the attorney-general . . . .
>
> . . . . .
>
> Whenever one judge stands up in a State and enjoins the governor and the attorney-general, the people resent it, and public sentiment is stirred, as it was in my State, when there was almost a rebellion, whereas if three judges declare that a state statute is unconstitutional the people would rest easy under it." 45 Cong. Rec. 7256.[13]

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[11] See Hutcheson, *supra*, at 803–804.

[12] See, *e. g.*, 45 Cong. Rec. 7253 (1910) (remarks of Senator Crawford). Although some litigation of this sort dragged on for as much as five years, *ibid.*, it is not clear that most state courts were any more expeditious, see Lilienthal, The Federal Courts and State Regulation of Public Utilities, 43 Harv. L. Rev. 379, 417 and n. 176 (1930).

[13] Senator Overman was probably referring to *Southern R. Co.* v. *McNeill*, 155 F. 756 (1907). There, after an injunction had been sustained by the Circuit Court, the Governor publicly urged state officials to ignore it. The railway complained to the Court that "these attacks on the part of the Governor and state officials against the company and its agents . . . had the effect of demoralizing the servants, agents, and employés of the company to such an extent as to render it well nigh impossible for complainant to properly discharge the duties which it owed the public . . . ." *Id.*, at 790–791.

In such an atmosphere was this three-judge court procedure put on the statute books, and although subsequent Congresses have amended the statute [14] its basic structure remains intact.

II.

Section 2281 was designed to provide a more responsible forum for the litigation of suits which, if successful, would render void state statutes embodying important state policies. The statute provides for notification to the State of a pending suit, 28 U. S. C. § 2284 (2) (1964 ed.), thus preventing *ex parte* injunctions common previously.[15] It provides for three judges, one of whom must be a circuit judge, 28 U. S. C. § 2284 (1) (1964 ed.), to allow a more authoritative determination and less opportunity for individual predilection in sensitive and politically emotional areas. It authorizes direct review by this Court, 28 U. S. C. § 1253, as a means of accelerating a final determination on the merits; an important criticism of the pre-1910 procedure was directed at the length of time required to appeal through the circuit courts to the Supreme Court, and the consequent disruption of state tax and regulatory programs caused by the outstanding injunction.[16]

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[14] The procedure was extended to cover challenges to orders of state administrative commissions in 1913, 37 Stat. 1013, 28 U. S. C. § 2281, and in 1925 suits for permanent injunctions were brought within its purview, 43 Stat. 938, 28 U. S. C. § 2281. Three-judge district courts are also required in certain suits arising under federal law. See Note, The Three-Judge District Court: Scope and Procedure Under Section 2281, 77 Harv. L. Rev. 299, 300–301 and n. 19 (1963).

[15] See Hutcheson, *supra,* at 800–801. Senator Crawford of South Dakota told the Congress that when his State Legislature was debating a maximum rate law, the railway companies had already prepared motions for injunctions:

"The statute passed and was presented to the governor for his signature, and in less than an hour after he had signed the bill and it was filed in the office of the secretary of state a restraining order came by telegraph from a United States judge, enjoining the governor and the attorney-general and all the officers in the State from proceeding to enforce that statute." 45 Cong. Rec. 7252 (1910).

That this procedure must be used in any suit for an injunction against state officials on the ground that a state enactment is unconstitutional has been clear from the start. What yet remains unclear, in spite of decisions by this and other courts, is the scope of the phrase "upon the ground of the unconstitutionality of such statute" when the complaint alleges not the traditional Due Process Clause, Equal Protection Clause, Commerce Clause, or Contract Clause arguments, but rather that the state statute or regulation in question is pre-empted by or in conflict with some federal statute or regulation thereunder. Any such pre-emption or conflict claim is of course grounded in the Supremacy Clause of the Constitution: if a state measure conflicts with a federal requirement, the state provision must give way. *Gibbons* v. *Ogden,* 9 Wheat. 1. The basic question involved in these cases, however, is never one of interpretation of the Federal Constitution but inevitably one of comparing two statutes. Whether one district judge or three must carry out this function is the question at hand.

The first decision of this Court casting light on the problem was *Ex parte Buder,* 271 U. S. 461, in which the question presented was, as here, whether an appeal was properly taken directly from the District Court to the Supreme Court. At issue was whether a Missouri statute authorizing taxation of bank shares remained valid after the enactment of a federal statute which enlarged the scope of the States' power to tax national banks by permitting taxation of shares, or dividends, or income. Under the federal scheme, States were apparently expected to choose one of the three methods. Although the Missouri law applied the first basis of assessment, the District Court held that because the State did not explicitly choose among the three types of taxation, but instead relied on a prior statute, the assessment was void. Mr. Justice Brandeis, writing for a unanimous Court, held that this was not properly a three-judge court case ". . . because no state statute was assailed as being repugnant to the Federal Constitution." 271 U. S., at 465. Although the complaint in *Buder* did not explicitly invoke the Supremacy Clause, it should be noted that the defendants' answer asserted that if the federal statute was constitutional under the Tenth Amendment, then it would indeed be the " 'supreme law of the land' within the meaning and provisions of Article VI of the Constitution of the United States," and thus controlling over the particular state statute unless that statute could be construed as consistent with the federal law. The District Court in *Buder* was thus clearly presented with the Supremacy Clause basis of the statutory conflict.

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[16] See, *id.,* at 7256 (remarks of Senator Crawford); note 12, *supra.*

Ex parte Bransford, 310 U. S. 354, raised a similar problem, also in the context of the validity of a state tax. The Court again held this type of federal-state confrontation outside the purview of the predecessor of § 2281:

> "If such assessments are invalid, it is because they levy taxes upon property withdrawn from taxation by federal law or in a manner forbidden by the National Banking Act. The declaration of the supremacy clause gives superiority to valid federal acts over conflicting state statutes but this superiority for present purposes involves merely the construction of an act of Congress, not the constitutionality of the state enactment." 310 U. S., at 358-359.

In a third case, *Case* v. *Bowles*, 327 U. S. 92, the question involved the proposed sale by the State of Washington of timber on state-owned land at a price violating the Federal Emergency Price Control Act of 1942. A federal district court enjoined the sale, and on appeal the State argued that the single judge lacked jurisdiction. This Court held otherwise: "the complaint did not challenge the constitutionality of the state statute but alleged merely that its enforcement would violate the Emergency Price Control Act. Consequently a three-judge court is not required." 327 U. S., at 97.[17]

The upshot of these decisions seems abundantly clear: Supremacy Clause cases are not within the purview of § 2281.[18] This distinction between cases involving claims that state statutes are unconstitutional within the scope of § 2281 and cases involving statutory pre-emption or conflict remained firm until *Kesler* v. *Department of Public Safety,* 369 U. S. 153, in which the plaintiff alleged a conflict between the federal bankruptcy laws and a state statute suspending the driving licenses of persons who are judgment debtors as a result of an adverse decision in an action involving the negligent operation of an automobile. It was argued that federal policy underlying the bankruptcy law overrode the State's otherwise legitimate exercise of its police power. Mr. Justice Frankfurter, for a majority, declared first that § 2281 made no distinction between the Supremacy Clause and other provisions of the Constitution as a ground for denying enforcement of a state statute, and second that *Buder, Bransford,* and *Case* could be distinguished on the ground that they presented no claims of unconstitutionality as such: "If in immediate controversy is not the unconstitutionality of a state law but merely the construction of a state law or the federal law, the three-judge requirement does not become operative." 369 U. S., at 157. In the *Kesler* case itself, Mr. Justice Frankfurter said, there was no problem of statutory construction but only a "constitutional question" whether the state enactment was pre-empted. After what can only be characterized as extensive statutory analysis (369 U. S., at 158–174) the majority concluded that there had in fact been no pre-emption.[19]

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[17] This basic rule has been reiterated in other familiar cases where the facts did not require its application. See *Query* v. *United States*, 316 U. S. 486, where, however, a three-judge court was found necessary because other not insubstantial constitutional claims had been clearly asserted. In *Florida Lime & Avocado Growers, Inc.* v. *Jacobsen*, 362 U. S. 73, the majority held that if a state statute is sought to be enjoined on constitutional grounds (Commerce Clause, Equal Protection) it did not matter that a "nonconstitutional" ground (pre-emption by the Federal Agricultural Marketing Agreement Act) was also asserted. Mr. Justice Frankfurter dissented, reasoning that the three-judge procedure should be read narrowly and that the mere availability of a "non-constitutional" basis for enjoining the state statute should give jurisdiction to a single judge. Both majority and dissent assumed that an attack upon a state enactment on the ground that it was inconsistent with a federal statute was such a "non-constitutional" ground.

[18] None of these cases can be read to suggest that the result depends on whether or not the complaint specifically invokes the Supremacy Clause, for that clause is the inevitable underpinning for the striking down of a state enactment which is inconsistent with federal law. See the quotation from *Bransford, supra*, p. 121, a case in which the Supremacy Clause was not invoked in the complaint. See also the discussion of *Ex parte Buder, supra*, pp. 120–121. Nor do any

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of these cases suggest that the issue turns on the amount of statutory construction involved, whether large, small, or simply of the character that entails laying the alleged conflicting statutes side by side.

[19] In dissent it was stated that the *Kesler* opinion "refutes the very test which it establishes." 369 U. S., at 177 (dissenting opinion of THE CHIEF JUSTICE). In addition, three Justices dissented in whole or in part from the conclusions derived from this statutory analysis.

III.

In re-examining the *Kesler* rule the admonition that § 2281 is to be viewed "not as a measure of broad social policy to be construed with great liberality, but as an enactment technical in the strict sense of the term and to be applied as such," *Phillips* v. *United States,* 312 U. S. 246, 251, should be kept in mind. The *Kesler* opinion itself reflects this admonition, for its rationalization of *Buder, Bransford,* and *Case* as being consistent with the view that Supremacy Clause cases are not excluded from "the comprehensive language of § 2281," 369 U. S., at 156, is otherwise most difficult to explain.

As a procedural rule governing the distribution of judicial responsibility the test for applying § 2281 must be clearly formulated. The purpose of the three-judge scheme was in major part to expedite important litigation: it should not be interpreted in such a way that litigation, like the present one, is delayed while the proper composition of the tribunal is litigated. We are now convinced that the *Kesler* rule, distinguishing between cases in which substantial statutory construction is required and those in which the constitutional issue is "immediately" apparent, is in practice unworkable. Not only has it been uniformly criticized by commentators,[20] but lower courts have quite evidently sought to avoid dealing with its application[21] or have interpreted it with uncertainty.[22] As Judge Friendly's opinion for the court below demonstrates, in order to ascertain the correct forum, the merits must first be adjudicated in order to discover whether the court has "engaged in so much more construction than in Kesler as to make that ruling inapplicable." 230 F. Supp., at 410. Such a formulation, whatever its abstract justification, cannot stand as an every-day test for allocating litigation between district courts of one and three judges.

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[20] See Currie, *supra,* at 61–64 (1964); Note, 77 Harv. L. Rev. 299, 313–315 (1963); Note, 49 Va. L. Rev. 538, 553–555 (1963); 76 Harv. L. Rev. 168 (1962); 15 Stan. L. Rev. 565 (1963); 1962 U. Ill. L. F. 467; 111 U. Pa. L. Rev. 113 (1962).

[21] See *Borden Co.* v. *Liddy,* 309 F. 2d 871; *American Travelers Club, Inc.* v. *Hostetter,* 219 F. Supp. 95, 102, n. 7.

[22] See, in addition to the case before us, *Bartlett & Co.* v. *State Corp. Comm'n of Kansas,* 223 F. Supp. 975.

Two possible interpretations of § 2281 would provide a more practicable rule for three-judge court jurisdiction. The first is that *Kesler* might be extended to hold, as some of its language might be thought to indicate,[23] that *all* suits to enjoin the enforcement of a state statute, whatever the federal ground, must be channeled through three-judge courts. The second is that *no* such suits resting solely on "supremacy" grounds fall within the statute.

The first alternative holds some attraction. First, it is relatively straightforward: a court need not distinguish among different constitutional grounds for the requested injunction; it need look only at the relief sought. Moreover, in those cases, as in that before us, in which an injunction is sought on several grounds, the proper forum would not depend on whether certain alleged constitutional grounds turn out to be insubstantial. Second, § 2281 speaks of "unconstitutionality," and, to be sure, any determination that a state statute is void for obstructing a federal statute does rest on the Supremacy Clause of the Federal Constitution. And, third, there is some policy justification for a wider rule. In a broad sense, what concerned the legislators who passed the progenitor of § 2281 was the voiding of state legislation by inferior federal courts. The sensibilities of the citizens, and perhaps more particularly of the state officials, were less likely to be offended, the Congress thought, by a judgment considered and handed down by three judges rather than by one judge. This rationale can be thought to be as applicable to a suit voiding state legislation on grounds of conflict with a federal statute as it is to an identical suit alleging a conflict with the Federal Constitution directly.

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[23] "Neither the language of § 2281 nor the purpose which gave rise to it affords the remotest reason for carving out an unfrivolous claim of unconstitutionality because of the Supremacy Clause from the comprehensive language of § 2281." 369 U. S., at 156.

Persuasive as these considerations may be, we believe that the reasons supporting the second interpretation, that is, returning to the traditional *Buder-Bransford-Case* rule, should carry the day. This restrictive view of the application of § 2281 is more consistent with a discriminating reading of the statute itself than is the first and more embracing interpretation. The statute requires a three-judge court in order to restrain the enforcement of a state statute "upon the ground of the unconstitutionality of such statute." Since all federal actions to enjoin a state enactment rest ultimately on the Supremacy Clause,[24] the words "upon the ground of the unconstitutionality of such statute" would appear to be superfluous unless they are read to exclude some types of such injunctive suits.[25] For a simple provision prohibiting the restraint of the enforcement of any state statute except by a three-judge court would manifestly have sufficed to embrace every such suit whatever its particular constitutional ground. It is thus quite permissible to read the phrase in question as one of limitation, signifying a congressional purpose to confine the three-judge court requirement to injunction suits depending directly upon a substantive provision of the Constitution, leaving cases of conflict with a federal statute (or treaty) to follow their normal course in a single-judge court. We do not suggest that this reading of § 2281 is compelled. We do say, however, that it is an entirely appropriate reading, and one that is supported by all the precedents in this Court until *Kesler* and by sound policy considerations.

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[24] Art. VI, cl. 2. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

[25] The "unconstitutionality" clause of § 2281 can hardly be thought to encompass the voiding of a state statute for inconsistency with the state constitution. Cf. *Florida Lime & Avocado Growers, Inc.* v. *Jacobsen*, 362 U. S. 73, 80.

An examination of the origins of the three-judge procedure does not suggest what the legislators would have thought about this particular problem, but it does show quite clearly what sort of cases *were* of concern to them. Their ire was aroused by the frequent grants of injunctions against the enforcement of progressive state regulatory legislation, usually on substantive due process grounds. (See pp. 116–119, *supra.*) Requiring the collective judgment of three judges and accelerating appeals to this Court were designed to safeguard important state interests. In contrast, a case involving an alleged incompatibility between state and federal statutes, such as the litigation before us, involves more confining legal analysis and can hardly be thought to raise the worrisome possibilities that economic or political predilections will find their way into a judgment. Moreover, those who enacted the three-judge court statute should not be deemed to have been insensitive to the circumstance that single-judge decisions in conflict and pre-emption cases were always subject to the corrective power of Congress, whereas a "constitutional" decision by such a judge would be beyond that ready means of correction and could be dealt with only by constitutional amendment. The purpose of § 2281 to provide greater restraint and dignity at the district court level cannot well be thought generally applicable to cases that involve conflicts between state and federal statutes, in this instance determining whether the Department of Agriculture's regulations as applied to the labeling of total net weight on frozen stuffed turkeys necessarily renders invalid a New York statute requiring a supplemental net weight figure which excludes the stuffing.

Our decision that three-judge courts are not required in Supremacy Clause cases involving only federal-state statutory conflicts, in addition to being most consistent with the statute's structure, with pre-*Kesler* precedent, and with the section's historical purpose, is buttressed by important considerations of judicial administration. As Mr. Justice Frankfurter observed in *Florida Lime & Avocado Growers, Inc.* v. *Jacobsen*, 362 U. S. 73, 92–93 (dissenting opinion):

> "[T]he convening of a three-judge trial court makes for dislocation of the normal structure and functioning of the lower federal courts, particularly in the vast non-metropolitan regions; and direct review of District Court judgments by this Court not only expands this Court's obligatory jurisdiction but contradicts the dominant principle of having this Court review decisions only after they have gone through two judicial sieves . . . ."

Although the number of three-judge determinations each year should not be exaggerated,[26] this Court's concern for efficient operation of the lower federal courts persuades us to return to the *Buder-Bransford-Case* rule, thereby conforming with the constrictive view of the three-judge jurisdiction which this Court has traditionally taken. *Ex parte Collins,* 277 U. S. 565; *Oklahoma Gas & Elec. Co.* v. *Oklahoma Packing Co.,* 292 U. S. 386; *Rorick* v. *Board of Commissioners,* 307 U. S. 208; *Phillips* v. *United States,* 312 U. S. 246.

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[26] The statistics are summarized in Note, 77 Harv. L. Rev. 299, 303–305 (1963); Note, 72 Yale L. J. 1646, 1654–1659 (1963). The most recent figures show that out of the 11,485 trials completed in district courts in fiscal 1965, only 147 were heard by three-judge courts. Of these 60 dealt with I. C. C. regulations, 35 with civil rights, and only 52 with state or local law. 1965 Dir. Adm. Off. U. S. Courts Ann. Rep. II–25, II–28.

We hold therefore that this appeal is not properly before us under 28 U. S. C. § 1253 and that appellate review lies in the Court of Appeals, where appellants' alternative appeal is now pending. The appeal is dismissed for lack of jurisdiction.

It is so ordered.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK and MR. JUSTICE CLARK concur, dissenting.

Less than four years ago, this Court decided that a three-judge district court was required in suits brought under 28 U. S. C. § 2281, even though the alleged "ground of the unconstitutionality" of the challenged statute was based upon a conflict between state and federal statutes. *Kesler* v. *Department of Public Safety,* 369 U. S. 153.

A state statute may violate the Equal Protection Clause of the Fourteenth Amendment or the Due Process Clause or some other express provision of the Constitution. If so a three-judge court is plainly required by 28 U. S. C. § 2281. But the issue of the "unconstitutionality" of a state statute can be raised as clearly by a conflict between it and an Act of Congress as by a conflict between it and a provision of the Constitution. The Supremacy Clause, contained in Art. VI, cl. 2, of the Constitution, states as much in clear language:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the

> Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

An issue of the "unconstitutionality" of a state statute is therefore presented whether the conflict is between a provision of the Constitution and a state enactment or between the latter and an Act of Congress. What Senator Overman, author of the three-judge provision, said of it in 1910 is as relevant to enjoining a state law on the ground of federal pre-emption as it is to enjoining it because it violates the Fourteenth Amendment:

> "The point is, this amendment is for peace and good order in the State. Whenever one judge stands up in a State and enjoins the governor and the attorney-general, the people resent it, and public sentiment is stirred, as it was in my State, when there was almost a rebellion, whereas if three judges declare that a state statute is unconstitutional the people would rest easy under it. But let one little judge stand up against the whole State, and you find the people of the State rising up in rebellion. The whole purpose of the proposed statute is for peace and good order among the people of the States." 45 Cong. Rec. 7256.

Some of the most heated controversies between State and Nation which this Court has supervised have involved questions whether there was a conflict between a state statute and a federal one or whether a federal Act was so inclusive as to pre-empt state action in the particular area. One of the earliest and most tumultuous was *Cohens* v. *Virginia,* 6 Wheat. 264, 440, where the alleged unconstitutionality of a Virginia law was based on the argument that an Act of Congress, authorizing a lottery in the District of Columbia, barred Virginia from making it a criminal offense to sell lottery tickets within that State. The protest from the States was vociferous[1] even though the Court in the end construed the federal Act to keep it from operating in Virginia. *Id.*, at 447. I therefore see no difference between a charge of "unconstitutionality" of a state statute whether the conflict be between it and the Constitution or between it and a federal law. Neither the language of the Supremacy Clause nor reason nor history makes any difference plain.

Pre-emption or conflict of a state law with a federal one is a recurring theme[2] arising in various contexts. The storm against *Cohens* v. *Virginia* was a protest against this Court's acting as referee in a federal-state contest involving pre-emption or a conflict between the laws of the two regimes. Congress has recently been concerned with the problem in another aspect of the matter,[3] when efforts were made to curb the doctrine of preemption by establishing standards for an interpretation of an Act of Congress.[4] The three-judge court is only another facet of the self-same problem.

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[1] See 1 Warren, The Supreme Court in United States History, p. 552 *et seq.* (1928).

"The *Richmond Enquirer* spoke of the opinion, 'so important in its consequences and so obnoxious in its doctrines,' and said that 'the very title of the case is enough to stir one's blood.' It feared that 'the Judiciary power, with a foot as noiseless as time and a spirit as greedy as the grave, is sweeping to their destruction the rights of the States. . . . These encroachments have increased, are increasing and ought to be diminished'; and it advocated a repeal of the fatal Section of the Judiciary Act as 'the most advisable and constitutional remedy for the evil.' A leading Ohio paper spoke of 'the alarming progress of the Supreme Court in subverting the Federalist principles of the Constitution and introducing on their ruins a mighty consolidated empire fitted for the sceptre of a great monarch'; and it continued: 'That the whole tenor of their decisions, when State-Rights have been involved, have had a direct tendency to reduce our governors to the condition of mere provincial satraps, and that a silent acquiescence in these decisions will bring us to this lamentable result, is to us as clear as mathematical demonstration.'" *Id.*, at 552–553.

[2] Thus the dissent in *Cloverleaf Co.* v. *Patterson,* 315 U. S. 148, 179, called that decision in favor of pre-emption "purely destructive legislation." And see *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218; *Campbell* v. *Hussey,* 368 U. S. 297. Cf. *Hostetter* v. *Idlewild Liquor Corp.*, 377 U. S. 324.

The history of 28 U. S. C. § 2281, as related by the Court, speaks of the concern of Congress over the power of one judge to bring a halt to an entire state regulatory scheme. That can—and will hereafter—happen in all cases of pre-emption or conflict where the Supremacy Clause is thought to require state policy to give way. A fairly recent example is *Cloverleaf Co.* v. *Patterson,* 315 U. S. 148, where a federal court injunction in a pre-emption case suspended Alabama's program for control of renovated butter—a demonstrably important health measure. The Court in *Florida Lime Growers* v. *Jacobsen,* 362 U. S. 73, where one of the issues was pre-emption or conflict between two statutory systems, emphasized that the interest of the States in being free from such injunctive interference *at the instance of a single judge* outweighed the additional burdens that such a rule imposed on the federal court system. On reflection I think that result better reflects congressional policy even though, as in *Cohens* v. *Virginia,* the end result is only a matter of statutory construction.

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[3] H. R. 3, 88th Cong., 1st Sess., in material part provided:

"No Act of Congress shall be construed as indicating an intent on the part of Congress to occupy the field in which such Act operates, to the exclusion of all State laws on the same subject matter, unless such Act contains an express provision to that effect, or unless there is a direct and positive conflict between such Act and a State law so that the two cannot be reconciled or consistently stand together."

The first version of the bill was introduced in 1956. The House Committee on the Judiciary made numerous changes, limiting its application to the subject of subversion, and reported the bill out with a "do pass" recommendation. H. R. Rep. No. 2576, 84th Cong., 2d Sess. The Senate version, S. 3143, was not so narrowed in Committee. S. Rep. No. 2230, 84th Cong., 2d Sess. The bill was not passed in either the House or the Senate.

H. R. 3 was again introduced in the Eighty-fifth Congress. The Judiciary Committee again recommended that the bill "do pass," but this time did not narrow its scope to the subject of subversion. See H. R. Rep. No. 1878, 85th Cong., 2d Sess. It was passed by the House on July 17, 1958.

H. R. 3, having once again been approved by the Judiciary Committee, H. R. Rep. No. 422, 86th Cong., 1st Sess., was approved by the House on June 24, 1959.

In the Eighty-seventh Congress, H. R. 3 was favorably reported out by the Judiciary Committee. H. R. Rep. No. 1820, 87th Cong., 2d Sess., but was not acted upon by the full House.

[4] The concern of Congress in this chapter of federal-state relations did not concern the three-judge court problem but the broader aspects envisaged by such cases as *Pennsylvania* v. *Nelson,* 350 U. S. 497, *Phillips Petroleum Co.* v. *Wisconsin,* 347 U. S. 672, *Slochower* v. *Board of Education,* 350 U. S. 551, *Railway Employes* v. *Hanson,* 351 U. S. 225, and *Cloverleaf Co.* v. *Patterson,* 315 U. S. 148. See H. R. Rep. No. 1820, 87th Cong., 2d Sess., p. 3 *et seq.*

On the basis of virtually no experience in applying that interpretation of the statute, a majority has now decided that the rule of *Kesler* is "unworkable" and, therefore, that our previous interpretation of the statute must have been incorrect. I regret that I am unable to join in that decision. My objection is not that the Court has not given *Kesler* "a more respectful burial," *Gideon* v. *Wainwright,* 372 U. S. 335, 349 (concurring opinion), but that the Court has engaged in unwarranted infanticide.

Stare decisis is no immutable principle.[5] There are many occasions when this Court has overturned a prior decision, especially in matters involving an interpretation of the Constitution or where the problem of statutory construction had constitutional overtones.

An error in interpreting a federal statute may be easily remedied. If this Court has failed to perceive the intention of Congress, or has interpreted a statute in such a manner as to thwart the legislative purpose, Congress may change it. The lessons of experience are not learned by judges alone.

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[5] See Radin, Case Law and Stare Decisis, 33 Col. L. Rev. 199 (1933).

I am unable to find a justification for overturning a decision of this Court interpreting this Act of Congress, announced only on March 26, 1962.

If the Court were able to show that our decision in *Kesler* had thrown the lower courts into chaos, a fair case for its demise might be made out. The Court calls the rule "unworkable." But it is not enough to attach that label. The Court broadly asserts that "lower courts have quite evidently sought to avoid dealing with its [*Kesler's*] application or have interpreted it with uncertainty." For this proposition, only three cases (in addition to the instant case) are cited. The Court's failure to provide more compelling documentation for its indictment of *Kesler* is not the result of less than meticulous scholarship, for so far as I have been able to discover, the truth of the matter is that there are no cases (not even the three cited) even remotely warranting the conclusion that *Kesler* is "unworkable."

Kesler was an attempt to harmonize our earlier cases. If the *Kesler* test is "unworkable" as the Court asserts, we should nonetheless accept its basic premise:

> "Neither the language of § 2281 nor the purpose which gave rise to it affords the remotest reason for carving out an unfrivolous claim of unconstitutionality because of the Supremacy Clause from the comprehensive language of § 2281." 369 U. S., at 156.

If there is overruling to be done, we should overrule *Ex parte Buder,* 271 U. S. 461, and *Ex parte Bransford,* 310 U. S. 354.

That the ground of unconstitutionality in many so-called Supremacy Clause cases is found only in the asserted conflict between federal and state statutes is, as I have said, no basis for distinguishing that class of cases from others in which three-judge courts are plainly required. While courts are, strictly speaking, engaging in statutory construction in such cases, the task of adjudication is much the same as in what all would concede to be constitutional adjudication. Though the purpose of Congress is the final touchstone, the interests which must be taken into account in either case are much the same, as *Cohens* v. *Virginia* eloquently demonstrates.

The Court has decided, on no more than the gloomy predictions contained in a handful of law review articles, that *Kesler* would inevitably produce chaos in the federal courts, that the rule announced there is "unworkable." Those predictions have plainly not been borne out. If difficulties arise, Congress can cure them. Until Congress acts, I would let *Kesler* stand.

I therefore believe that a three-judge court was properly convened and that we should decide this appeal on the merits.

UNITED STATES *v.* ROMANO ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 2. Argued October 14, 1965.—Decided November 22, 1965.

Respondents, who were found by federal officers near an operating still, were indicted on three counts charging, in Count 1, the possession, custody and control of an illegal still in violation of 26 U. S. C. § 5601 (a)(1); in Count 2, the illegal production of distilled spirits in violation of § 5601 (a)(8); and, in Count 3, a conspiracy to produce distilled spirits. Respondents were convicted and given concurrent prison sentences on each count and fined on Count 1. The Court of Appeals affirmed the conspiracy convictions but reversed the substantive convictions, holding invalid under the Due Process Clause of the Fifth Amendment an instruction and statutory inference embodied therein based on §§ 5601 (b)(1) and (4), which provide in part that presence of a defendant at an illegal still site shall be sufficient evidence to authorize conviction under §§ 5601 (a)(1) and (8) unless he explains such presence to the jury's satisfaction. *Held:*

1. It is unnecessary to consider the validity of § 5601 (b)(4) and the convictions under Count 2 since the sentences thereon were concurrent with the unchallenged sentences imposed on Count 3. P. 138.

2. The statutory inference in § 5601 (b)(1) is invalid since presence at an illegal still carries no reasonable inference of the crime of possession, custody, or control of the still proscribed by § 5601 (a)(1). *United States* v. *Gainey,* 380 U. S. 63, distinguished. Pp. 139–144.

330 F. 2d 566, affirmed.

Louis F. Claiborne argued the cause for the United States. On the brief were *Acting Solicitor General Spritzer, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Jerome M. Feit.*

W. Paul Flynn argued the cause and filed a brief for respondents.

MR. JUSTICE WHITE delivered the opinion of the Court.

Federal officers, armed with a search warrant, entered one of the buildings in an industrial complex in Jewett City, Connecticut. There they found respondents standing a few feet from an operating still. Respondents[1] were indicted on three counts: Count 1 charged possession, custody and control of an illegal still in violation of 26 U. S. C. § 5601 (a)(1);[2] Count 2, the illegal production of distilled spirits in violation of 26 U. S. C. § 5601 (a)(8);[3] and Count 3, a conspiracy to produce distilled spirits. Both respondents were convicted on all three counts, both were fined on Count 1 and both sentenced to concurrent terms of imprisonment on each of the three counts.

The Court of Appeals affirmed the convictions on Count 3. 330 F. 2d 566. It reversed the convictions on Counts 1 and 2 because the trial court in instructing the jury read verbatim provisions of § 5601 (b)(1)[4] and

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[1] Respondents were indicted with two others whose convictions are not in issue here.

[2] Section 5601 (a)(1) provides that any person who "has in his possession or custody, or under his control, any still or distilling apparatus set up which is not registered, as required by section 5179 (a) . . . shall be fined not more than $10,000, or imprisoned not more than 5 years, or both . . . ."

[3] Section 5601 (a)(8) provides that any person who, "not being a distiller authorized by law to produce distilled spirits, produces distilled spirits by distillation or any other process from any mash, wort, wash, or other material . . . shall be fined not more than $10,000, or imprisoned not more than 5 years, or both . . . ."

[4] Section 5601 (b)(1) of 26 U. S. C. provides: "Whenever on trial for violation of subsection (a)(1) the defendant is shown to have been at the site or place where, and at the time when, a still or distilling apparatus was set up without having been registered, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury (or of the court when tried without jury)."

§ 5601 (b)(4),[5] which provide in part that the presence of the defendant at the site of an illegal still "shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury . . . ." This instruction and the statutory inference which it embodied were held by the Court of Appeals to violate the Due Process Clause of the Fifth Amendment. We granted certiorari to consider this constitutional issue. 380 U. S. 941.

We agree as to the invalidity of § 5601 (b)(1) and the reversal of the convictions on Count 1. It is unnecessary, however, to consider the validity of § 5601 (b)(4) and the convictions on Count 2 since the sentences on that count were concurrent with the sentences, not here challenged, which were imposed on Count 3. *United States* v. *Gainey,* 380 U. S. 63, 65; *Sinclair* v. *United States,* 279 U. S. 263, 299.

If we were reviewing only the sufficiency of the evidence to support the verdict on Count 1, that conviction would be sustained. There was, as the Court of Appeals recognized, ample evidence in addition to presence at the still to support the charge of possession of an illegal still. But here, in addition to a standard instruction on reasonable doubt, the jury was told that the defendants' presence at the still "shall be deemed sufficient evidence to authorize conviction." This latter instruction may have been given considerable weight by the jury; the jury may have disbelieved or disregarded the other evidence of possession and convicted these defendants on the evidence of presence alone. We thus agree with the Court of Appeals that the validity of the statutory inference in the disputed instruction must be faced and decided.

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[5] Section 5601 (b)(4) of 26 U. S. C. provides: "Whenever on trial for violation of subsection (a)(8) the defendant is shown to have been at the site or place where, and at the time when, such distilled spirits were produced by distillation or any other process from mash, wort, wash, or other material, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury (or of the court when tried without jury)."

The test to be applied to the kind of statutory inference involved in this criminal case is not in dispute. In *Tot* v. *United States,* 319 U. S. 463, the Court, relying on a line of cases dating from 1910,[6] reaffirmed the limits which the Fifth and Fourteenth Amendments place "upon the power of Congress or that of a state legislature to make the proof of one fact or group of facts evidence of the existence of the ultimate fact on which guilt is predicated." *Id.,* at 467. Such a legislative determination would not be sustained if there was "no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience. . . . [W]here the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them, it is not competent for the legislature to create it as a rule governing the procedure of courts." *Id.,* at 467–468. Judged by this standard, the statutory presumption in issue there was found constitutionally infirm.

Just last Term, in *United States* v. *Gainey,* 380 U. S. 63, the Court passed upon the validity of a companion section to § 5601 (b)(1) of the Internal Revenue Code. The constitutionality of the legislation was held to depend upon the "rationality of the connection 'between the facts proved and the ultimate fact presumed.'" 380 U. S., at 66. Tested by this rule, the Court sustained the provision of 26 U. S. C. § 5601 (b)(2) declaring presence at a still to be sufficient evidence to authorize conviction under 26 U. S. C. § 5601 (a)(4) for carrying on the business of the distillery without giving the required bond. Noting that almost anyone at the site of a secret still could reasonably be said to be carrying on the business or aiding and abetting it and that Congress had accorded the evidence of presence only its "natural probative force," the Court sustained the presumption.

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[6] *Mobile, J. & K. C. R. Co.* v. *Turnipseed,* 219 U. S. 35; *Bailey* v. *Alabama,* 219 U. S. 219; *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61; *McFarland* v. *American Sugar Rfg. Co.,* 241 U. S. 79; *Manley* v. *Georgia,* 279 U. S. 1; *Western & Atlantic R. Co.* v. *Henderson,* 279 U. S. 639; *Morrison* v. *California,* 291 U. S. 82.

This case is markedly different from *Gainey, supra.* Congress has chosen in the relevant provisions of the Internal Revenue Code to focus upon various phases and aspects of the distilling business and to make each of them a separate crime. Count 1 of this indictment charges "possession, custody and . . . control" of an illegal still as a separate, distinct offense. Section 5601 (a)(1) obviously has a much narrower coverage than has § 5601 (a)(4) with its sweeping prohibition of carrying on a distilling business.

In *Bozza* v. *United States,* 330 U. S. 160, the Court squarely held, and the United States conceded, that presence alone was insufficient evidence to convict of the specific offense proscribed by § 5601 (a)(1), absent some evidence that the defendant engaged in conduct directly related to the crime of possession, custody or control. That offense was confined to those who had "custody or possession" of the still or acted in some "other capacity calculated to facilitate the custody or possession, such as, for illustration, service as a caretaker, watchman, lookout or in some other capacity." *Id.,* at 164. This requirement was not satisfied in the *Bozza* case either by the evidence showing participation in the distilling operations or by the fact that the defendant helped to carry the finished product to delivery vehicles. These facts, and certainly mere presence at the still, were insufficient proof that "petitioner ever exercised, or aided the exercise of, any control over the distillery." *Ibid.*

Presence at an operating still is sufficient evidence to prove the charge of "carrying on" because anyone present at the site is very probably connected with the illegal enterprise. Whatever his job may be, he is at the very least aiding and abetting the substantive crime of carrying on the illegal distilling business. Section 5601 (a)(1), however, proscribes possession, custody or control. This is only one of the various aspects of the total undertaking, many of which have nothing at all to do with possession, as *Bozza* made quite clear and as the United States conceded in that case. Presence tells us only that the defendant was there and very likely played a part in the illicit scheme. But presence tells us nothing about what the defendant's specific function was and carries no legitimate, rational or reasonable inference that he was engaged in one of the specialized functions connected with possession, rather than in one of the supply, delivery or operational activities having nothing to do with possession. Presence is relevant and admissible evidence in a trial on a possession charge; but absent some showing of the defendant's function at the still, its connection with possession is too tenuous to permit a reasonable inference of guilt—"the inference of the one from proof of the other is arbitrary . . . ." *Tot* v. *United States,* 319 U. S. 463, 467.

The United States has presented no cases in the courts which have sustained a conviction for possession based solely on the evidence of presence. All of the cases which deal with this issue and with which we are familiar have held presence alone, unilluminated by other facts, to be insufficient proof of possession.[7] Moreover, the

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[7] *E. g., Pugliese* v. *United States,* 343 F. 2d 837 (C. A. 1st Cir., 1965); *Barrett* v. *United States,* 322 F. 2d 292 (C. A. 5th Cir., 1963), rev'd on other grounds, *sub nom. United States* v. *Gainey,* 380 U. S. 63; *McFarland* v. *United States,* 273 F. 2d 417 (C. A. 5th Cir., 1960) (dictum); *Vick* v. *United States,* 216 F. 2d 228 (C. A.

Government apparently concedes in this case that except for the circumstances surrounding the adoption of the 1958 amendments to the Internal Revenue Code, which added the presumptions relating to illegal distilling operations, the crime of possession could not validly be inferred from mere presence at the still site.[8]

According to the Government, however, the 1958 amendments were, among other things, designed to overrule *Bozza* and must be viewed as broadening the substantive crime of possession to include all those present at a set-up still who have any connection with the illicit enterprise.[9] So broadened, it is argued, the substantive

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5th Cir., 1954); *United States* v. *De Vito,* 68 F. 2d 837 (C. A. 2d Cir., 1934); *Graceffo* v. *United States,* 46 F. 2d 852 (C. A. 3d Cir., 1931).

[8] Brief for petitioner, p. 14. See also brief for petitioner, p. 33, *United States* v. *Gainey,* 380 U. S. 63; *Bozza* v. *United States,* 330 U. S. 160, 164.

[9] The relevant Senate and House Reports discussing the presumptions added by § 5601 (b) are in identical language, which was borrowed from an analysis prepared by the Alcohol and Tobacco Tax Division of the Internal Revenue Service (see Hearings before a Subcommittee of the House Committee on Ways and Means on Excise Tax Technical and Administrative Problems, Part I, 84th Cong., 1st Sess., p. 208):

"These paragraphs are new. Their purpose is to create a rebuttable presumption of guilt in the case of a person who is found at illicit distilling or rectifying premises, but who, because of the practical impossibility of proving his actual participation in the illegal activities except by inference drawn from his presence when the illegal acts were committed, cannot be convicted under the ruling of the Supreme Court in *Bozza* v. *United States* (330 U. S. 160).

"The prevention of the illicit production or rectification of alcoholic spirits, and the consequent defrauding of the United States of tax, has long been rendered more difficult by the failure to obtain a conviction of a person discovered at the site of illicit distilling or rectifying premises, but who was not, at the time of such discovery, engaged in doing any specific act.

"In the Bozza case, the Supreme Court took the position that to sustain conviction, the testimony 'must point directly to conduct within the narrow margins which the statute alone defines.' These crime of "possessing," under the teachings of *Gainey*, could be acceptably proved by showing presence alone.

We are not persuaded by this argument, primarily because the amendments did not change a word of § 5601 (a)(1), which defines the substantive crime. Possession, custody or control remains the crime which the Government must prove. The amendments, insofar as relevant here, simply added § 5601 (b)(1) and permitted an inference of possession from the fact of presence. Moreover, the inference was not irrebuttable. It was allowable only if the defendant failed to explain his presence to the satisfaction of the jury. Plainly, it seems to us, the defendant would be exonerated if he satisfactorily explained or the circumstances showed that his function at the still was not in furtherance of the specific crime of possession, custody or control. If a defendant is charged with possession and it is unmistakably shown that delivery, for example, was his sole duty, it would seem very odd under the present formulation of the Code to hold that his explanation had merely proved his guilt of "possessing" by showing some connection with the illegal business.

The Government's position would equate "possessing" with "carrying on." We are not convinced that the amendments to the Code included in the Excise Tax Technical Changes Act of 1958 were intended to work any such substantive change in the basic scheme of the Act, which was, in the words of the Government's brief in this Court, "to make criminal every meaningful form of participation in, or assistance to, the operation of an illegal still by an elaborate pattern of partially redundant provisions—some specific and some general—designed to close all loopholes." Possession, custody or control was

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new provisions are designed to avoid the effect of that holding as to future violations." S. Rep. No. 2090, 85th Cong., 2d Sess., pp. 188–189; H. R. Rep. No. 481, 85th Cong., 1st Sess., p. 175.

one of the specific crimes defined in the Code and we do not think that the 1958 amendments worked any change in this regard.[10] On the legislative record before us, we reject the Government's expansive reading of the 1958 amendments.

Congress may have intended by the 1958 amendments to avoid the *Bozza* case. But it chose to do so, not by changing the definition of the substantive crime, but by declaring presence to be sufficient evidence to prove the crime of possession beyond reasonable doubt. This approach obviously fails under the standards traditionally applied to such legislation. It may be, of course, that Congress has the power to make presence at an illegal still a punishable crime, but we find no clear indication that it intended to so exercise this power.[11] The crime remains possession, not presence, and, with all due deference to the judgment of Congress, the former may not constitutionally be inferred from the latter. *Affirmed.*

MR. JUSTICE BLACK concurs in the reversal of these convictions for the reasons stated in his dissent against affirmance of the conviction in *United States* v. *Gainey,* 380 U. S. 63, 74.

MR. JUSTICE DOUGLAS concurs in the result for the reasons stated in his opinion in *United States* v. *Gainey,* 380 U. S. 63, 71.

MR. JUSTICE FORTAS concurs in the result.

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[10] In reference to the re-enactment of § 5601 (a)(1), the provision that defines the substantive offense, the Reports merely say, "This paragraph is a restatement of existing law. . . ." S. Rep. No. 2090, 85th Cong., 2d Sess., p. 186; H. R. Rep. No. 481, 85th Cong., 1st Sess., p. 173.

[11] The Government advanced a somewhat similar contention in *Tot.* It was rejected, partly on the ground that it was not supported by legislative history. *Tot* v. *United States,* 319 U. S. 463, 472. Cf. *United States* v. *Universal C. I. T. Credit Corp.,* 344 U. S. 218.

UNITED STEELWORKERS OF AMERICA, AFL-CIO *v.* R. H. BOULIGNY, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 19. Argued October 21, 1965.—Decided November 22, 1965.

Respondent, a North Carolina corporation, brought this defamation action in a North Carolina court against petitioner, an unincorporated labor union. Petitioner's principal place of business purportedly is Pennsylvania, where for purposes of diversity jurisdiction it claimed citizenship, though some of its members reside in North Carolina. Petitioner removed the case to a Federal District Court, which refused to remand, finding no proper basis for treating an unincorporated labor union differently from a corporation. On interlocutory appeal the Court of Appeals reversed and directed that the case be remanded to the state court. *Held:*

1. Article III, § 2, of the Constitution extends federal jurisdiction to suits between "citizens" of different States. A corporation for diversity purposes has long been deemed to be a citizen of the State in which it is incorporated, *Louisville, C. & C. R. Co.* v. *Letson,* 2 How. 497; *Marshall* v. *Baltimore & O. R. Co.,* 16 How. 314, and such status is recognized by statute. 28 U. S. C. § 1332 (c). Pp. 147–148.

2. An unincorporated labor union is not a "citizen" for purposes of the statute conferring diversity jurisdiction, its citizenship being deemed that of each of its members. *Chapman* v. *Barney,* 129 U. S. 677, followed; *Puerto Rico* v. *Russell & Co.,* 288 U. S. 476, distinguished. Whether any change in that rule is to be made so as to assimilate unincorporated labor unions to the status of corporations for diversity purposes is a matter for legislative, and not judicial, determination. Pp. 149–153.

336 F. 2d 160, affirmed.

Michael H. Gottesman argued the cause for petitioner. With him on the briefs were *David E. Feller, Bernard Kleiman, Elliott Bredhoff* and *Jerry D. Anker.*

Joseph W. Grier, Jr., argued the cause for respondent. With him on the brief was *Gaston H. Gage.*

MR. JUSTICE FORTAS delivered the opinion of the Court.

Respondent, a North Carolina corporation, brought this action in a North Carolina state court. It sought $200,000 in damages for defamation alleged to have occurred during the course of the United Steelworkers' campaign to unionize respondent's employees. The Steelworkers, an unincorporated labor union whose principal place of business purportedly is Pennsylvania, removed the case to a Federal District Court.[1] The union asserted not only federal-question jurisdiction, but that for purposes of the diversity jurisdiction it was a citizen of Pennsylvania, although some of its members were North Carolinians.

The corporation sought to have the case remanded to the state courts, contending that its complaint raised no federal questions and relying upon the generally prevailing principle that an unincorporated association's citizenship is that of each of its members. But the District Court retained jurisdiction. The District Judge noted "a trend to treat unincorporated associations in the same manner as corporations and to treat them as citizens of the state wherein the principal office is located." Divining "no common sense reason for treating an unincorporated national labor union differently from a corporation," he declined to follow what he styled "the poorer reasoned but more firmly established rule" of *Chapman* v. *Barney*, 129 U. S. 677.

On interlocutory appeal the Court of Appeals for the Fourth Circuit reversed and directed that the case be remanded to the state courts. 336 F. 2d 160. Certiorari was granted, 379 U. S. 958, so that we might decide whether an unincorporated labor union is to be treated as a citizen for purposes of federal diversity jurisdiction, without regard to the citizenship of its members.[2] Because we believe this properly a matter for legislative consideration which cannot adequately or appropriately be dealt with by this Court, we affirm the decision of the Court of Appeals.

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[1] 28 U. S. C. § 1441 (a) (1964 ed.) provides: "Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending."

Article III, § 2, of the Constitution provides:

> "The judicial Power shall extend . . . to Controversies . . . between Citizens of different States . . . ."

Congress lost no time in implementing the grant. In 1789 it provided for federal jurisdiction in suits "between a citizen of the State where the suit is brought, and a citizen of another State." [3] There shortly arose the question as to whether a corporation—a creature of state law—is to be deemed a "citizen" for purposes of the statute. This Court, through Chief Justice Marshall, initially responded in the negative, holding that a corporation was not a "citizen" and that it might sue and be sued under the diversity statute only if none of its shareholders was a co-citizen of any opposing party.

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[2] Petitioner does not here challenge the Court of Appeals' finding with respect to the absence of federal-question jurisdiction. Mention of this finding is omitted from the "statement of the case" portion of petitioner's brief. Instead, petitioner expresses an intention, on remand of this case, to raise a different issue—that libel suits brought against unions for conduct arising in the course of an organizational campaign are within the exclusive jurisdiction of the National Labor Relations Board and may not be the subject of litigation, at least initially, in state or federal court. Compare *Linn* v. *United Plant Guard Workers of America, Local 114,* 337 F. 2d 68 (C. A. 6th Cir.), cert. granted, 381 U. S. 923, with *Meyer* v. *Joint Council 53, Intern'l Bro. of Teamsters,* 416 Pa. 401, 206 A. 2d 382, petition for cert. dismissed under Rule 60, *post,* p. 897.

[3] 1 Stat. 78.

Bank of the United States v. *Deveaux,* 5 Cranch 61. In 1844 the Court reversed itself and ruled that a corporation was to be treated as a citizen of the State which created it. *Louisville, C. & C. R. Co.* v. *Letson,* 2 How. 497. Ten years later, the Court reached the same result by a different approach. In a compromise destined to endure for over a century,[4] the Court indulged in the fiction that, although a corporation was not itself a citizen for diversity purposes, its shareholders would conclusively be presumed citizens of the incorporating State. *Marshall* v. *Baltimore & O. R. Co.,* 16 How. 314.

Congress re-entered the lists in 1875, significantly expanding diversity jurisdiction by deleting the requirement imposed in 1789 that one of the parties must be a citizen of the forum State.[5] The resulting increase in the quantity of diversity litigation, however, cooled enthusiasts of the jurisdiction, and in 1887 and 1888 Congress enacted sharp curbs. It quadrupled the jurisdictional amount, confined the right of removal to nonresident defendants, reinstituted protections against jurisdiction by collusive assignment, and narrowed venue.[6]

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[4] See 72 Stat. 415 (1958), 28 U. S. C. § 1332 (c), providing that: "For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business."

[5] 18 Stat. 470.

[6] 24 Stat. 552, 553, as amended by 25 Stat. 434. On the historical background of these changes in the diversity jurisdiction see generally, Moore and Weckstein, Diversity Jurisdiction: Past, Present, and Future, 43 Tex. L. Rev. 1 (1964); Moore and Weckstein, Corporations and Diversity of Citizenship Jurisdiction: A Supreme Court Fiction Revisited, 77 Harv. L. Rev. 1426 (1964); Hart and Wechsler, The Federal Courts and the Federal System 891–943 (1953).

It was in this climate that the Court in 1889 decided *Chapman* v. *Barney, supra.* On its own motion the Court observed that plaintiff was a joint stock company and not a corporation or natural person. It held that although plaintiff was endowed by New York with capacity to sue, it could not be considered a "citizen" for diversity purposes. 129 U. S., at 682.[7]

In recent years courts and commentators have reflected dissatisfaction with the rule of *Chapman* v. *Barney.*[8] The distinction between the "personality" and "citizenship" of corporations and that of labor unions and other unincorporated associations, it is increasingly argued, has become artificial and unreal. The mere fact that a corporation is endowed with a birth certificate is, they say, of no consequence. In truth and in fact, they point out, many voluntary associations and labor unions are indistinguishable from corporations in terms of the reality of function and structure, and to say that the latter are juridical persons and "citizens" and the former are not is to base a distinction upon an inadequate and irrelevant difference. They assert, with considerable merit, that it is not good judicial administration, nor is it fair, to remit a labor union or other unincorporated association to vagaries of jurisdiction determined by the citizenship of its members and to disregard the fact that unions and associations may exist and have an identity and a local habitation of their own.

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[7] Equally responsive to the congressional intent as manifested in 1887 and 1888 was the Court's decision in 1892 in *Shaw* v. *Quincy Mining Co.,* 145 U. S. 444, holding that in a diversity suit a corporation could only be sued in the State of incorporation, even though its principal place of business was elsewhere.

[8] See *Mason* v. *American Express Co.,* 334 F. 2d 392 (C. A. 2d Cir.); 78 Harv. L. Rev. 1661 (1965); 53 Geo. L. J. 513 (1965); 65 Col. L. Rev. 162 (1965); *American Fed. of Musicians* v. *Stein,* 213 F. 2d 679, 685–689 (C. A. 6th Cir.), cert. denied, 348 U. S. 873, suggesting that a trial court might find a union to be a citizen for diversity purposes—a suggestion rejected on remand, 183 F. Supp. 99 (D. C. M. D. Tenn.); and *Van Sant* v. *American Express Co.,* 169 F. 2d 355 (C. A. 3d Cir.); Comment, 1965 Duke L. J. 329; Note, Unions as Juridical Persons, 66 Yale L. J. 712, 742–749 (1957). Cf. *Swan* v. *First Church of Christ, Scientist, in Boston,* 225 F. 2d 745 (C. A. 9th Cir.). But see *Brocki* v. *American Express Co.,* 279 F. 2d 785 (C. A. 6th Cir.), cert. denied, 364 U. S. 871; *Underwood* v. *Maloney,* 256 F. 2d 334 (C. A. 3d Cir.), cert. denied, 358 U. S. 864; *A. H. Bull Steamship Co.* v. *NMEBA,* 250 F. 2d 332 (C. A. 2d Cir.), each of which takes a more conventional view.

The force of these arguments in relation to the diversity jurisdiction is particularized by petitioner's showing in this case. Petitioner argues that one of the purposes underlying the jurisdiction—protection of the nonresident litigant from local prejudice—is especially applicable to the modern labor union. According to the argument, when the nonresident defendant is a major union, local juries may be tempted to favor local interests at its expense. Juries may also be influenced by the fear that unionization would adversely affect the economy of the community and its customs and practices in the field of race relations. In support of these contentions, petitioner has exhibited material showing that during organizational campaigns like that involved in this case, localities have been saturated with propaganda concerning such economic and racial fears. Extending diversity jurisdiction to unions, says petitioner, would make available the advantages of federal procedure, Article III judges less exposed to local pressures than their state court counterparts, juries selected from wider geographical areas, review in appellate courts reflecting a multistate perspective, and more effective review by this Court.

We are of the view that these arguments, however appealing, are addressed to an inappropriate forum, and that pleas for extension of the diversity jurisdiction to hitherto uncovered broad categories of litigants ought to be made to the Congress and not to the courts.

Petitioner urges that in *Puerto Rico* v. *Russell & Co.,* 288 U. S. 476, we have heretofore breached the doctrinal wall of *Chapman* v. *Barney* and, that step having been taken, there is now no necessity for enlisting the assistance of Congress. But *Russell* does not furnish the precedent which petitioner seeks. The problem which it presented was that of fitting an exotic creation of the civil law, the *sociedad en comandita,* into a federal scheme which knew it not. The Organic Act of Puerto Rico conferred jurisdiction upon the federal court if all the parties on either side of a controversy were citizens of a foreign state or "citizens of a State, Territory or District of the United States not domiciled in Puerto Rico."[9] All of the *sociedad's* members were nonresidents of Puerto Rico, and jurisdiction lay in the federal court if they were the "parties" to the action. But this Court held that the *sociedad* itself, not its members, was the party, doing so on a basis that is of no help to petitioner. It did so because, as Justice Stone stated for the Court, in "[t]he tradition of the civil law, as expressed in the Code of Puerto Rico," "the *sociedad* is consistently regarded as a juridical person." 288 U. S., at 480–481. Accordingly, the Court held that the *sociedad,* Russell & Co., was a citizen domiciled in Puerto Rico, within the meaning of the Organic Act, and ordered the case remanded to the insular courts. It should be noted that the effect of *Russell* was to contract jurisdiction of the federal court in Puerto Rico.[10]

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[9] The federal district court in Puerto Rico had jurisdiction "of all cases cognizable in the district courts of the United States" and "of all controversies where all of the parties on either side of the controversy are citizens or subjects of a foreign State or States, or citizens of a State, Territory, or District of the United States not domiciled in Puerto Rico . . . ." § 41, Organic Act of Puerto Rico of 1917, 39 Stat. 965 (now 48 U. S. C. § 863). See 70 Stat. 658 (1956), amending 28 U. S. C. § 1332, relating to the treatment of the Commonwealth of Puerto Rico for diversity purposes.

If we were to accept petitioner's urgent invitation to amend diversity jurisdiction so as to accommodate its case, we would be faced with difficulties which we could not adequately resolve. Even if the record here were adequate, we might well hesitate to assume that petitioner's situation is sufficiently representative or typical to form the predicate of a general principle. We should, for example, be obliged to fashion a test for ascertaining of which State the labor union is a citizen. Extending the jurisdiction to corporations raised no such problem, for the State of incorporation was a natural candidate, its arguable irrelevance in terms of the policies underlying the jurisdiction being outweighed by its certainty of application. But even that easy and apparent solution did not dispose of the problem; in 1958 Congress thought it necessary to enact legislation providing that corporations are citizens both of the State of incorporation and of the State in which their principal place of business is located.[11] Further, in contemplating a rule which would accommodate petitioner's claim, we are acutely aware of the complications arising from the circumstance that petitioner, like other labor unions, has local as well as national organizations and that these, perhaps, should be reckoned with in connection with "citizenship" and its jurisdictional incidents.[12]

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[10] As the Court noted in *Russell*, 288 U. S., at 482, the effect of its decision was to prevent nonresidents from organizing *sociedads* to carry on business in Puerto Rico and then "remove from the Insular Courts controversies arising under local law." The Court of Appeals for the Second Circuit in *Mason*, 334 F. 2d, at 397, n. 8, seems to assert that *Russell* had the effect of broadening the diversity jurisdiction. We do not agree. At the time *Russell* was decided, Puerto Rico was not considered a "State" for purposes of the federal diversity jurisdiction statute. Accordingly, a *sociedad*, although recognized as a citizen of Puerto Rico in *Russell*, could not avail itself of the general diversity statute.

[11] See note 4, *supra*.

Whether unincorporated labor unions ought to be assimilated to the status of corporations for diversity purposes, how such citizenship is to be determined, and what if any related rules ought to apply, are decisions which we believe suited to the legislative and not the judicial branch, regardless of our views as to the intrinsic merits of petitioner's argument—merits stoutly attested by widespread support for the recognition of labor unions as juridical personalities.[13]

We affirm the decision below.

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[12] The American Law Institute has proposed that for diversity purposes unincorporated associations be deemed citizens of the States in which their principal places of business are located, but that they be disabled from initiating diversity litigation in States where they maintain "local establishments." ALI, Study of the Division of Jurisdiction Between State and Federal Courts, Proposed Final Draft No. 1 (1965), §§ 1301 (b) (2) and 1302 (b). Compare 29 U. S. C. § 185 (c), which provides: "For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members."

[13] See, *e. g., United Mine Workers* v. *Coronado Coal Co.,* 259 U. S. 344; Rule 17 (b) of the Fed. Rules Civ. Proc.; ALI, Study, *supra;* 3 Moore, Federal Practice ¶ 17.25 (2d ed., 1964); Note, Unions as Juridical Persons, 66 Yale L. J. 712 (1957). Cf. 78 Stat. 445 (1964), which amended 28 U. S. C. § 1332 (c) to confer citizenship upon insurers, "whether incorporated or unincorporated," involved in direct-action suits; Note, Developments in the Law—Judicial Control of Actions of Private Associations, 76 Harv. L. Rev. 983, 1080–1100 (1963).

SEABOARD AIR LINE RAILROAD CO. ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA.

No. 425. Decided November 22, 1965.*

The Interstate Commerce Commission (ICC), after administrative proceedings, approved a merger between the Atlantic Coast Line Railroad Company and the Seaboard Air Line Railroad Company. Though recognizing that the merger would eliminate competition in parts of Florida, the ICC found that the benefits of the merger outweighed its potential disadvantages. On the ground that the ICC failed to determine whether the merger violated § 7 of the Clayton Act by reference to the relevant product and geographic markets, a three-judge District Court set aside the ICC's order. *Held:* The ICC is authorized to approve a merger notwithstanding what would otherwise be violative of the antitrust laws if it makes adequate findings after weighing the effects of the curtailment of competition against the advantages of improved service that the merger would be "consistent with the public interest" under § 5 (2)(b) of the Interstate Commerce Act and further the overall transportation policy. *McLean Trucking Co.* v. *United States,* 321 U. S. 67; *Minneapolis & St. Louis R. Co.* v. *United States,* 361 U. S. 173, followed.

242 F. Supp. 14, vacated and remanded.

Paul A. Porter, Dennis G. Lyons, Harold J. Gallagher, Walter H. Brown, Jr., Richard A. Hollander, Edwin H. Burgess, Prime F. Osborn, Albert B. Russ, Jr., and *Phil C. Beverly* for appellants in No. 425. *Robert W. Ginnane* and *Fritz R. Kahn* for appellant in No. 555.

Solicitor General Marshall, Assistant Attorney General Turner and *Lionel Kestenbaum* for the United States. *A. Alvis Layne* and *Fred H. Kent* for Florida East Coast

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*Together with No. 555, *Interstate Commerce Commission* v. *Florida East Coast Railway Co. et al.,* also on appeal from the same court.

Railway Co., *W. Graham Claytor, Jr.*, for Southern Railway Co., and *Edward J. Hickey, Jr.*, and *William G. Mahoney* for Railway Labor Executives' Association, appellees.

PER CURIAM.

Atlantic Coast Line Railroad Company and Seaboard Air Line Railroad Company filed with the Interstate Commerce Commission an application for authority to merge. In the administrative proceedings, the applicants contended that the merger would enable them to lower operating costs, improve service, and eliminate duplicate facilities; other carriers opposed the merger on the ground that it would have adverse competitive effects; and the Department of Justice contended that the merger would create a rail monopoly in central and western Florida.

The Commission approved the merger, subject to routing and gateway conditions to protect competing railroads. It recognized that the merger would eliminate competition and create a rail monopoly in parts of Florida. But it found that the merged lines carried only a small part of the total traffic in the area involved; that ample rail competition would remain therein; and that the reduction in competition would "have no appreciably injurious effect upon shippers and communities." *Seaboard Air Line Railroad Co.*, 320 I. C. C. 122, 167. In addition, the Commission noted that the need to preserve intramodal rail competition had diminished, due to the fact that railroads were increasingly losing traffic to truck, water, and other modes of competition.

A three-judge District Court set aside the order and remanded the case to the Commission for further proceedings. It concluded that the Commission's analysis of the competitive effects of the merger was fatally defective because the Commission had not determined whether the merger violated § 7 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 18 (1964 ed.), by reference to the relevant product and geographic markets. By thus disposing of the case, the District Court did not reach the ultimate question whether the merger would be consistent with the public interest despite the foreseeable injury to competition.[1]

We believe that the District Court erred in its interpretation of the directions this Court set forth in *McLean Trucking Co.* v. *United States,* 321 U. S. 67 (1944), and *Minneapolis & St. Louis R. Co.* v. *United States,* 361 U. S. 173 (1959). As we said in *Minneapolis,* at 186:

> "Although § 5 (11) does not authorize the Commission to 'ignore' the antitrust laws, *McLean Trucking Co.* v. *United States,* 321 U. S. 67, 80, there can be 'little doubt that the Commission is not to measure proposals for [acquisitions] by the standards of the antitrust laws.' 321 U. S., at 85–86. The problem is one of accommodation of § 5 (2) and the antitrust legislation. The Commission remains obligated to 'estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed [acquisition] and consider them along with the advantages of improved service [and other matters in the public interest] to determine whether the [acquisition] will assist in effectuating the overall transportation policy.' 321 U. S., at 87."

The same criteria should be applied here to the proposed merger. It matters not that the merger might otherwise violate the antitrust laws; the Commission has been authorized by the Congress to approve the merger of railroads if it makes adequate findings in accordance with the criteria quoted above that such a merger would be "consistent with the public interest." 54 Stat. 906, 49 U. S. C. § 5 (2)(b) (1964 ed.).

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[1] It expressly declined to consider two further issues, *i. e.,* whether the Commission's labor-protection conditions were adequate and whether control of the merged company by the Mercantile-Safe Deposit and Trust Company would be consistent with the public interest.

Whether the Commission has confined itself within the statutory limits upon its discretion and has based its findings on substantial evidence are questions for the trial court in the first instance, *United States* v. *Great Northern R. Co.,* 343 U. S. 562, 578 (1952), and we indicate no opinion on the same. We therefore vacate the judgment of the District Court and remand the case to it for a full review of the administrative order and findings pursuant to the standards enunciated by this Court.

Vacated and remanded.

MR. JUSTICE FORTAS took no part in the consideration or decision of these cases.

UNITED STATES *v.* MARYLAND FOR THE USE OF MEYER ET AL.

ON PETITION FOR REHEARING.

No. 543, October Term, 1963. Certiorari denied December 16, 1963.—Rehearing denied December 7, 1964.—Rehearing and certiorari granted and case decided November 22, 1965.

116 U. S. App. D. C. 259, 322 F. 2d 1009, reversed and remanded for further proceedings on unresolved issues in complaint.

Solicitor General Cox, Assistant Attorney General Douglas, Morton Hollander and *David L. Rose* for the United States.

Louis G. Davidson, Richard W. Galiher, William E. Stewart, Jr., and *Peter J. McBreen* for respondents.

PER CURIAM.

The motion for leave to file a conditional petition for rehearing is granted and the petition for rehearing is also granted. The order of December 16, 1963, 375 U. S. 954, denying the petition for writ of certiorari is vacated, and the petition for writ of certiorari is granted. The judgment of the Court of Appeals for the District of Columbia Circuit is reversed in conformity with our decision in *Maryland for the use of Levin et al.* v. *United States,* 381 U. S. 41, and the case is remanded to the United States District Court for the District of Columbia for further proceedings with respect to the unresolved issues tendered in respondents' bill of complaint.

It is so ordered.

MR. JUSTICE CLARK and MR. JUSTICE HARLAN, believing that a remand is legally unjustified, dissent from that part of the Court's order.

MR. JUSTICE FORTAS took no part in the consideration or decision of this case.

MARYLAND FOR THE USE OF LEVIN ET AL. *v.* UNITED STATES.

ON PETITION FOR REHEARING.

No. 345, October Term, 1964.

Rehearing and motion to remand granted November 22, 1965; 381 U. S. 41, vacated and amended; 329 F. 2d 722, modified and remanded for further proceedings on unresolved issues in complaint.

Theodore E. Wolcott for petitioners.

Solicitor General Marshall, former *Solicitor General Cox, Assistant Attorney General Douglas, Morton Hollander, Nathan Lewin* and *David L. Rose* for the United States.

Louis G. Davidson, Richard W. Galiher, William E. Stewart, Jr., and *Peter J. McBreen,* as *amici curiae,* urging reversal.

PER CURIAM.

The petition for rehearing and the motion to remand for trial on unresolved issues are granted as herein indicated. The judgment of this Court of May 3, 1965, 381 U. S. 41, is vacated, and in lieu thereof the following judgment is entered: "The judgment of the Court of Appeals for the Third Circuit is modified to direct that the case be remanded to the United States District Court for the Western District of Pennsylvania for further proceedings with respect to the unresolved issues tendered in petitioners' bill of complaint, and is in all other respects affirmed."

It is so ordered.

MR. JUSTICE CLARK and MR. JUSTICE HARLAN, believing that a remand is legally unjustified, dissent from that part of the Court's order.

MR. JUSTICE FORTAS took no part in the consideration or decision of this case.

REYNOLDS METALS CO. *v.* WASHINGTON ET AL.

APPEAL FROM THE SUPREME COURT OF WASHINGTON.

No. 537. Decided November 22, 1965.

65 Wash. 2d 882, 400 P. 2d 310, appeal dismissed.

DeWitt Williams for appellant.

John J. O'Connell, Attorney General of Washington, and *James A. Furber* and *Henry W. Wager,* Assistant Attorneys General, for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

MR. JUSTICE STEWART and MR. JUSTICE WHITE are of the opinion that probable jurisdiction should be noted.

MR. JUSTICE HARLAN took no part in the consideration or decision of this case.

HODGES ET AL. *v.* BUCKEYE CELLULOSE CORP.

APPEAL FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT.

No. 548. Decided November 22, 1965.

174 So. 2d 565, appeal dismissed.

George C. Dayton and *Joe A. McClain* for appellants.

Richard W. Barrett and *J. Lewis Hall* for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction.

FLORIDA EAST COAST RAILWAY CO. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA.

No. 541. Decided November 22, 1965.

242 F. Supp. 490, affirmed.

A. Alvis Layne and *Fred H. Kent* for appellant.

Solicitor General Marshall, Assistant Attorney General Turner, Robert B. Hummel and *Robert W. Ginnane* for the United States et al.; *Prime F. Osborn* and *Phil C. Beverly* for Atlantic Coast Line Railroad Co.; and *William H. Maness* for A. Duda & Sons, Inc., et al., appellees.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.

MR. JUSTICE FORTAS took no part in the consideration or decision of this case.

KASHARIAN *v.* WILENTZ.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

No. 672, Misc. Decided November 22, 1965.

Appeal dismissed and certiorari denied.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

HARRIS *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 6. Argued October 11-12, 1965.—Decided December 6, 1965.

Petitioner, a grand jury witness, refused on self-incrimination grounds to answer certain questions. He and the grand jury were brought before the District Judge, who advised petitioner that he would receive immunity from prosecution and ordered him to answer the questions before the grand jury, but petitioner refused again. He was brought before the court again and sworn and once more refused to answer on the ground of privilege. The District Judge thereupon adjudged petitioner guilty of criminal contempt and imposed a prison sentence under Rule 42 (a) of the Rules of Criminal Procedure, which provides for summary punishment for criminal contempt committed in the court's presence. *Held:*

1. Summary punishment of criminal contempt under Rule 42 (a) is reserved for such acts of misconduct in the court's presence as threatening the judge or obstructing court proceedings and other exceptional circumstances requiring prompt vindication of the court's dignity and authority. P. 164.

2. A refusal to testify, such as the one here, not involving a serious threat to orderly procedure is punishable only after notice and hearing as provided by Rule 42 (b). *Brown* v. *United States,* 359 U. S. 41, overruled. Pp. 164-167.

334 F. 2d 460, reversed and remanded.

Ronald L. Goldfarb argued the cause for petitioner. With him on the briefs were *E. David Rosen* and *Jacob Kossman.*

Ralph S. Spritzer argued the cause for the United States. With him on the brief were *Solicitor General Marshall, Assistant Attorney General Vinson, Nathan Lewin, Beatrice Rosenberg* and *Sidney M. Glazer.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This case brings back to us a question resolved by a closely divided Court in *Brown* v. *United States,* 359

U. S. 41, concerning the respective scope of Rule 42 (a) and of Rule 42 (b) of the Federal Rules of Criminal Procedure. Petitioner was a witness before a grand jury and refused to answer certain questions on the ground of self-incrimination. He and the grand jury were brought before the District Court which directed him to answer the questions propounded before the grand jury, stating that petitioner would receive immunity from prosecution. He refused again to give any answers to the grand jury. He was thereupon brought before the District Court and sworn. The District Court repeated the questions and directed petitioner to answer, but he refused on the ground of privilege. The prosecution at once requested that petitioner be found in contempt of court "under Rule 42 (a)." Counsel for petitioner protested and requested an adjournment and a public hearing where he would be permitted to call witnesses. The District Court denied the motion and thereupon adjudged petitioner guilty of criminal contempt, imposing a sentence of one year's imprisonment.[1] The Court of Appeals

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[1] "The Court: Anything further?

"Mr. Maloney: No, your Honor.

"I think the record speaks for itself, and I would ask your Honor to find this witness in contempt of court under Rule 42 (a) of the Federal Rules of Criminal Procedure.

"Mr. Polakoff: Your Honor, if this is a contempt proceeding I respectfully request an adjournment. I want to have the minutes and I want to have an opportunity to discuss them and consider them with my client and to look up the law.

"I further request, your Honor, a hearing where I will be permitted to call witnesses, perhaps a grand juror or two or more; perhaps the places the phone calls allegedly were made as indicated by the assistant, to prove to your Honor that there could be no possible violation of the Communications Act.

"I have not been told what tariff has been violated; no law has been cited or rule or regulation to your Honor or to me, and that requires research.

"I also would request that the contempt hearing be held in public.

"The Court: Your request is denied. This is a contempt com-affirmed, 334 F. 2d 460. We granted certiorari, 379 U. S. 944.

Rule 42 (a) is entitled "Summary Disposition" and reads as follows:

> "A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record."

Rule 42 (a) was reserved "for exceptional circumstances," *Brown* v. *United States,* 359 U. S. 41, 54 (dissenting opinion), such as acts threatening the judge or disrupting a hearing or obstructing court proceedings. *Ibid.* We reach that conclusion in light of "the concern long demonstrated by both Congress and this Court over the possible abuse of the contempt power," *ibid.,* and in light of the wording of the Rule. Summary contempt is for "misbehavior" (*Ex parte Terry,* 128 U. S. 289, 314) in the "actual presence of the court." Then speedy punishment may be necessary in order to achieve "summary vindication of the court's dignity and authority." *Cooke* v. *United States,* 267 U. S. 517, 534. But swiftness was not a prerequisite of justice here. Delay necessary for a hearing would not imperil the grand jury proceedings.

Cases of the kind involved here are foreign to Rule 42 (a). The real contempt, if such there was, was contempt before the grand jury—the refusal to answer to it when directed by the court. Swearing the witness and repeating the questions before the judge was an effort to have the refusal to testify "committed in the actual presence of the court" for the purposes of Rule

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mitted in open court, and I adjudge the defendant guilty of a criminal contempt rule under Rule 42 (a)."

42 (a). It served no other purpose, for the witness had been adamant and had made his position known. The appearance before the District Court was not a new and different proceeding, unrelated to the other. It was ancillary to the grand jury hearing and designed as an aid to it. Even though we assume *arguendo* that Rule 42 (a) may at times reach testimonial episodes, nothing in this case indicates that petitioner's refusal was such an open, serious threat to orderly procedure that instant and summary punishment, as distinguished from due and deliberate procedures (*Cooke* v. *United States, supra,* at 536), was necessary. Summary procedure, to use the words of Chief Justice Taft, was designed to fill "the need for immediate penal vindication of the dignity of the court." *Ibid.* We start from the premise long ago stated in *Anderson* v. *Dunn,* 6 Wheat. 204, 231, that the limits of the power to punish for contempt are "[t]he least possible power adequate to the end proposed." [2] In the instant case, the dignity of the court was not being affronted: no disturbance had to be quelled; no insolent tactics had to be stopped. The contempt here committed was far outside the narrow category envisioned by Rule 42 (a).[3]

Rule 42 (b) provides the normal procedure. It reads:

> "A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts

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[2] And see *Nye* v. *United States,* 313 U. S. 33, 52–53; *In re Michael,* 326 U. S. 224, 227; *Cammer* v. *United States,* 350 U. S. 399, 404.

[3] Rule 42 (a) was described by the Advisory Committee as "substantially a restatement of existing law. Ex parte Terry, 128 U. S. 289; Cooke v. United States . . . ." We have confirmed this on more than one occasion, *e. g., Offutt* v. *United States,* 348 U. S. 11, 13–14; *Brown* v. *United States, supra,* at 51.

> constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment."

Such notice and hearing serve important ends. What appears to be a brazen refusal to cooperate with the grand jury may indeed be a case of frightened silence. Refusal to answer may be due to fear—fear of reprisals on the witness or his family. Other extenuating circumstances may be present.[4] We do not suggest that there were circumstances of that nature here. We are wholly ignorant of the episode except for what the record shows and it reveals only the barebones of demand and refusal. If justice is to be done, a sentencing judge should know all the facts. We can imagine situations where the questions are so inconsequential to the grand jury but the fear of reprisal so great that only nominal punishment, if any, is indicated. Our point is that a hearing and only a hearing will elucidate all the facts and assure a fair administration of justice. Then courts will not act on surmise or suspicion but will come to the sentencing stage of the proceeding with insight and understanding.

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[4] Chief Justice Taft said in *Cooke* v. *United States, supra,* at 537: "Due process of law, therefore, in the prosecution of contempt, except of that committed in open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. We think this includes the assistance of counsel, if requested, and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed."

We are concerned solely with "procedural regularity" which, as Mr. Justice Brandeis said in *Burdeau* v. *McDowell,* 256 U. S. 465, 477 (dissenting), has been "a large factor" in the development of our liberty. Rule 42 (b) prescribes the "procedural regularity" for all contempts in the federal regime [5] except those unusual situations envisioned by Rule 42 (a) where instant action is necessary to protect the judicial institution itself.

We overrule *Brown* v. *United States, supra,* and reverse and remand this case for proceedings under Rule 42 (b).

Reversed and remanded.

MR. JUSTICE STEWART, with whom MR. JUSTICE CLARK, MR. JUSTICE HARLAN, and MR. JUSTICE WHITE join, dissenting.

The issue in this case is the procedure to be followed when a witness has refused to answer questions before a grand jury after he has been ordered to do so by a district court. This issue, involving Rule 42 (a) and Rule 42 (b) of the Federal Rules of Criminal Procedure, was, as the Court says, resolved in *Brown* v. *United States,*

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[5] In more than one instance in the Southern District of New York, from which this case comes, witnesses cited for testimonial contempt before the grand jury were given hearings under Rule 42 (b). *E. g., United States* v. *Castaldi,* 338 F. 2d 883; *United States* v. *Tramunti,* 343 F. 2d 548; *United States* v. *Shillitani,* 345 F. 2d 290; *United States* v. *Pappadio,* 346 F. 2d 5. There is no indication that this procedure impeded the functioning of the grand jury.

359 U. S. 41.[1] That was six years ago. Since then this Court has made no changes in Rule 42 (a) or 42 (b).[2] But today *Brown* is overturned, and the question it "resolved" is now answered in the opposite way.

The particular question at issue here is of limited importance. But in this area the Court's duty is important, involving as it does the responsibility for clear and consistent guidance to the federal judiciary in the application of ground rules of our own making. We are not faithful to that duty, I think, when we overturn a settled construction of those rules for no better reasons than those the Court has offered in this case.[3]

The limited scope of the question at issue is made clear by the present record. A grand jury in the Southern District of New York was investigating alleged violations of the Communications Act of 1934.[4] The petitioner appeared before this grand jury pursuant to a subpoena. He refused to answer a number of questions about an interstate telephone call upon the ground of possible self-incrimination. The petitioner was then granted immunity from any possible self-incrimination under § 409 (l) of the Communications Act.[5] Only after giving the petitioner and his lawyer full opportunity to be heard did the District Judge rule that the petitioner was clothed with complete constitutional immunity from self-incrimination, and only then did he direct the petitioner to answer the grand jury's questions. The petitioner returned to the grand jury room and again refused to answer the questions, this time in direct and deliberate disobedience of the District Judge's order.

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[1] *Brown* v. *United States* was reaffirmed and followed in *Levine* v. *United States*, 362 U. S. 610.

[2] The proposed amendments to Rules of Criminal Procedure for the United States District Courts, approved on September 22–23, 1965, by the Judicial Conference of the United States, make no changes in Rule 42 (a) or Rule 42 (b).

[3] No argumentation or factual data are contained in the Court's opinion today which were not fully revealed in the dissenting opinion in *Brown*, 359 U. S., at 53–63, *passim*, and considered by the Court there. Nor is it suggested that the *Brown* rule has proved to be unclear or difficult of application. The considerations attending the overruling of *Brown* are quite unlike those involved in the overruling that occurred in *Swift & Co., Inc.* v. *Wickham*, *ante*, p. 111, where the Court changed a procedural rule which it found unworkable in actual practice.

[4] 48 Stat. 1070 and 1100, 47 U. S. C. §§ 203 (c) and 501 (1964 ed.), and 18 U. S. C. § 1952 (1964 ed.).

It is common ground, I suppose, that the petitioner was then and there in contempt of court.[6] Since the petitioner's refusal to obey the judge's order did not occur within the sight and hearing of the judge, a contempt proceeding could then have been initiated only under Rule 42 (b). Such a proceeding would have been fully consonant with our decision in *Brown*,[7] and a judge "more intent upon punishing the witness than aiding the grand jury in its investigation might well have taken just such a course." 359 U. S., at 50. In such a proceeding all that would have been required to prove the contempt would have been the testimony of the grand jury stenographer, and the judge could then have imposed sentence. Such a procedure is often followed.[8]

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[5] 48 Stat. 1096, 47 U. S. C. § 409 (*l*) (1964 ed.).

[6] The prevailing opinion today says, "The real contempt, if such there was, was contempt before the grand jury . . . ." But a grand jury is without power itself to compel the testimony of witnesses. It is the court's process which summons the witness to attend and give testimony, and it is the court which must compel a witness to testify, if, after appearing, he refuses to do so.

[7] "When upon his return to the grand jury room the petitioner again refused to answer the grand jury's questions, now in direct disobedience of the court's order, he was for the first time guilty of contempt. At that point a contempt proceeding could unquestionably and quite properly have been initiated. Since this disobedience of the order did not take place in the actual presence of the court, and thus could be made known to the court only by the taking of evidence, the proceeding would have been conducted upon notice and hearing in conformity with Rule 42 (b). See *Carlson* v. *United States*, 209 F. 2d 209, 216 (C. A. 1st Cir.)." 359 U. S., at 50.

Instead, however, the District Judge in this case followed the alternative procedure approved in *Brown*. He made one last effort to aid the grand jury in its investigation and gave the petitioner a final chance to purge himself of contempt. The petitioner and his lawyer appeared before the judge in open court.[9] After the petitioner was sworn as a witness, the judge propounded the same questions which the petitioner had refused to answer before the grand jury. The petitioner again refused to answer. At the conclusion of the questioning the judge asked, "Does anybody want to say anything further?" The only response from the petitioner's counsel, then or later,[10] was a brief renewal of his attack upon the purpose of the grand jury investigation and the scope of the immunity which had been conferred upon the petitioner—legal questions which the judge had, after a complete hearing, fully determined before he had ordered the petitioner to answer the grand jury's questions in the first place.

The procedure followed by the District Court in this case was in precise conformity with Rule 42 (a) and with long-settled and consistently followed practice.[11] It is a procedure which, in this context, is at least as fair as a Rule 42 (b) proceeding. The petitioner, represented by counsel, was accorded an additional chance to purge himself of contempt; he and his counsel were accorded full opportunity to offer any explanation they might have had in extenuation of the contempt—to inform the "sentencing judge of all the facts." And finally, there is no reason to assume that a sentence imposed for obduracy before a grand jury is likely to be more severe in a Rule 42 (a) proceeding than one imposed after a proceeding under Rule 42 (b). Indeed, the recent Rule 42 (b) cases in the Southern District of New York referred to by the Court indicate the contrary.[12] A sentence for contempt is reviewable on appeal in either case,[13] and there is nothing to suggest that in the exercise of this reviewing power an appellate court will have any more information to go on in the one case than in the other.

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[8] See cases cited in note 5 of the Court's opinion, *ante*, p. 167.

[9] The record shows that the court was "opened by proclamation."

[10] Before imposing sentence, the judge gave petitioner and his counsel still another opportunity to offer any explanation they might have of the petitioner's obduracy:

"The Court: I have already made my position perfectly clear, but I will say it again: I have directed you to answer these questions before the grand jury, and I have directed you to answer them here. It is my ruling that you cannot be prosecuted for any answer that you give under the circumstances of this case. Do you still refuse, Mr. Harris?

"The Witness: I respectfully refuse to answer on the grounds it would tend to incriminate me.

"The Court: Anything further?"

For these reasons I would affirm the judgment of the Court of Appeals.

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[11] See, in addition to *Brown* v. *United States,* 359 U. S. 41, and *Levine* v. *United States,* 362 U. S. 610: *Rogers* v. *United States,* 340 U. S. 367; *Wilson* v. *United States,* 221 U. S. 361, 369; *Hale* v. *Henkel,* 201 U. S. 43, 46; *United States* v. *Curcio,* 234 F. 2d 470, 473 (C. A. 2d Cir.), rev'd on other grounds, 354 U. S. 118 (1957); *Lopiparo* v. *United States,* 216 F. 2d 87 (C. A. 8th Cir.); *United States* v. *Weinberg,* 65 F. 2d 394, 396 (C. A. 2d Cir.). For the earlier practice at common law, see *People ex rel. Phelps* v. *Fancher,* 4 Thompson & Cook 467 (N. Y. 1874); *People ex rel. Hackley* v. *Kelly,* 24 N. Y. 74, 79–80 (1861); *In re Harris,* 4 Utah 5, 8–9, 5 P. 129, 130–132 (1884); *Heard* v. *Pierce,* 8 Cush. 338, 342–345 (Mass. 1851).

[12] See note 5 of the Court's opinion, *ante,* p. 167. *United States* v. *Castaldi,* 338 F. 2d 883 (two years); *United States* v. *Tramunti,* 343 F. 2d 548 (one year); *United States* v. *Shillitani,* 345 F. 2d 290 (two years); *United States* v. *Pappadio,* 346 F. 2d 5 (two years).

[13] See *Green* v. *United States,* 356 U. S. 165, 188; *Yates* v. *United States,* 356 U. S. 363; *Nilva* v. *United States,* 352 U. S. 385, 396; *Brown* v. *United States,* 359 U. S. 41, 52.

WALKER PROCESS EQUIPMENT, INC. *v.* FOOD MACHINERY & CHEMICAL CORP.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 13. Argued October 12–13, 1965.—Decided December 6, 1965.

Petitioner, in answer to respondent's suit for patent infringement, denied the infringement and counterclaimed for a declaratory judgment holding the patent invalid. After discovery proceedings, respondent moved to dismiss its complaint because the patent had expired. Petitioner then amended its counterclaim to charge that respondent had illegally monopolized commerce by having fraudulently and in bad faith obtained and maintained the patent in violation of the antitrust laws, and sought treble damages. The District Court dismissed the complaint and the counterclaim and the Court of Appeals affirmed. *Held:* The enforcement of a patent procured by fraud on the Patent Office may violate § 2 of the Sherman Act, provided all other elements to establish a § 2 monopolization charge are proved, in which event the treble-damage provisions of § 4 of the Clayton Act would be available to the injured party. Pp. 175–178.

(a) Petitioner is not barred by the rule that only the United States may sue to cancel a patent since by its counterclaim under the Clayton Act it does not directly seek the patent's annulment. Pp. 175–176.

(b) In these circumstances rights under the antitrust laws outweigh the protection of patentees from vexatious suits. P. 176.

(c) The recovery of treble damages for the fraudulent procurement of a patent coupled with violations of § 2 of the Sherman Act accords with long-recognized procedures whereby an injured party may attack the misuse of patent rights. Pp. 176–177.

(d) Proof of intentional fraud in obtaining the patent would deprive respondent of its exemption from the antitrust laws, while its good faith would furnish a complete defense. P. 177.

(e) The case is remanded to the trial court to allow petitioner to clarify and offer proof on the alleged violations of § 2. P. 178.

335 F. 2d 315, reversed and remanded.

Charles J. Merriam argued the cause for petitioner. With him on the briefs were *Edward A. Haight* and *Louis Robertson.*

Sheldon O. Collen argued the cause for respondent. With him on the brief were *R. Howard Goldsmith, Charles W. Ryan* and *Lloyd C. Hartman.*

Daniel M. Friedman argued the cause for the United States, as *amicus curiae,* urging reversal. On the brief were *Assistant Attorney General Orrick* and *Robert B. Hummel.*

MR. JUSTICE CLARK delivered the opinion of the Court.

The question before us is whether the maintenance and enforcement of a patent obtained by fraud on the Patent Office may be the basis of an action under § 2 of the Sherman Act,[1] and therefore subject to a treble damage claim by an injured party under § 4 of the Clayton Act.[2] The respondent, Food Machinery & Chemical Corp. (hereafter Food Machinery), filed this suit for infringement of its patent No. 2,328,655 covering knee-action swing diffusers used in aeration equipment for sewage treatment systems.[3] Petitioner, Walker Process Equipment, Inc. (hereafter Walker), denied the infringement and counterclaimed for a declaratory judgment that the patent was invalid. After discovery, Food Machinery moved to dismiss its complaint with prejudice because the patent had expired. Walker then amended its counterclaim to charge that Food Machinery had "illegally monopolized interstate and foreign commerce by fraudulently and in bad faith obtaining and maintaining . . . its patent . . . well knowing that it had no basis for . . . a patent." It alleged fraud on the basis that Food Machinery had sworn before the Patent Office that it neither knew nor believed that its invention had been in public use in the United States for more than one year prior to filing its patent application when, in fact, Food Machinery was a party to prior use within such time. The counterclaim further asserted that the existence of the patent had deprived Walker of business that it would have otherwise enjoyed. Walker prayed that Food Machinery's conduct be declared a violation of the antitrust laws and sought recovery of treble damages.

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[1] 26 Stat. 209, 15 U. S. C. § 2 (1964 ed.):

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . . ."

[2] 38 Stat. 731, 15 U. S. C. § 15 (1964 ed.):

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

[3] The patent in question was issued in the name of the inventor, Lannert. But he had previously assigned the patent rights to his employer, Chicago Pump Company, a division of Food Machinery.

The District Court granted Food Machinery's motion and dismissed its infringement complaint along with Walker's amended counterclaim, without leave to amend and with prejudice. The Court of Appeals for the Seventh Circuit affirmed, 335 F. 2d 315. We granted certiorari, 379 U. S. 957. We have concluded that the enforcement of a patent procured by fraud on the Patent Office may be violative of § 2 of the Sherman Act provided the other elements necessary to a § 2 case are present. In such event the treble damage provisions of § 4 of the Clayton Act would be available to an injured party.

I.

As the case reaches us, the allegations of the counterclaim, as to the fraud practiced upon the Government by Food Machinery as well as the resulting damage suffered by Walker, are taken as true.[4] We, therefore, move immediately to a consideration of the legal issues presented.

Both Walker and the United States, which appears as *amicus curiae,* argue that if Food Machinery obtained its patent by fraud and thereafter used the patent to exclude Walker from the market through "threats of suit" and prosecution of this infringement suit, such proof would establish a prima facie violation of § 2 of the Sherman Act. On the other hand, Food Machinery says that a patent monopoly and a Sherman Act monopolization cannot be equated; the removal of the protection of a patent grant because of fraudulent procurement does not automatically result in a § 2 offense. Both lower courts seem to have concluded that proof of fraudulent procurement may be used to bar recovery for infringement, *Precision Instrument Mfg. Co.* v. *Automotive Maintenance Machinery Co.,* 324 U. S. 806 (1945), but not to establish invalidity. As the Court of Appeals expressed the proposition, "only the government may 'annul or set aside' a patent," citing *Mowry* v. *Whitney,* 14 Wall. 434 (1872). It went on to state that no case had "decided, or hinted that fraud on the Patent Office may be turned to use in an original affirmative action, instead of as an equitable defense. . . . Since Walker admits that its anti-trust theory depends on its ability to prove fraud on the Patent Office, it follows that . . . Walker's second amended counterclaim failed to state a claim upon which relief could be granted." 335 F. 2d, at 316.

II.

We have concluded, first, that Walker's action is not barred by the rule that only the United States may sue to cancel or annul a patent. It is true that there is no statutory authority for a private annulment suit and the invocation of the equitable powers of the court might often subject a patentee "to innumerable vexatious suits to set aside his patent." *Mowry, supra,* at 441. But neither reason applies here. Walker counterclaimed under the Clayton Act, not the patent laws. While one of its elements is the fraudulent procurement of a patent, the action does not directly seek the patent's annulment. The gist of Walker's claim is that since Food Machinery obtained its patent by fraud it cannot enjoy the limited exception to the prohibitions of § 2 of the Sherman Act, but must answer under that section and § 4 of the Clayton Act in treble damages to those injured by any monopolistic action taken under the fraudulent patent claim. Nor can the interest in protecting patentees from "innumerable vexatious suits" be used to frustrate the assertion of rights conferred by the antitrust laws. It must be remembered that we deal only with a special class of patents, *i. e.,* those procured by intentional fraud.

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[4] See, *e. g., United States* v. *New Wrinkle, Inc.,* 342 U. S. 371, 376 (1952).

Under the decisions of this Court a person sued for infringement may challenge the validity of the patent on various grounds, including fraudulent procurement. *E. g., Precision Instrument Mfg. Co.* v. *Automotive Maintenance Machinery Co.,* 324 U. S. 806 (1945); *Hazel-Atlas Co.* v. *Hartford-Empire Co.,* 322 U. S. 238 (1944); *Keystone Driller Co.* v. *General Excavator Co.,* 290 U. S. 240 (1933). In fact, one need not await the filing of a threatened suit by the patentee; the validity of the patent may be tested under the Declaratory Judgment Act, 28 U. S. C. § 2201 (1964 ed.). See *Kerotest Mfg. Co.* v. *C-O Two Fire Equipment Co.,* 342 U. S. 180, 185 (1952). At the same time, we have recognized that an injured party may attack the misuse of patent rights. See, *e. g., Mercoid Corp.* v. *Mid-Continent Investment Co.,* 320 U. S. 661 (1944). To permit recovery of treble damages for the fraudulent procurement of the patent coupled with violations of § 2 accords with these long-recognized procedures. It would also promote the purposes so well expressed in *Precision Instrument, supra,* at 816:

> "A patent by its very nature is affected with a public interest. . . . [It] is an exception to the general rule against monopolies and to the right to access to a free and open market. The far-reaching social and economic consequences of a patent, therefore, give the public a paramount interest in seeing that patent monopolies spring from backgrounds free from fraud or other inequitable conduct and that such monopolies are kept within their legitimate scope."

III.

Walker's counterclaim alleged that Food Machinery obtained the patent by knowingly and willfully misrepresenting facts to the Patent Office. Proof of this assertion would be sufficient to strip Food Machinery of its exemption from the antitrust laws.[5] By the same token, Food Machinery's good faith would furnish a complete defense. This includes an honest mistake as to the effect of prior installation upon patentability—so-called "technical fraud."

To establish monopolization or attempt to monopolize a part of trade or commerce under § 2 of the Sherman Act, it would then be necessary to appraise the exclusionary power of the illegal patent claim in terms of the relevant market for the product involved. Without a definition of that market there is no way to measure Food Machinery's ability to lessen or destroy competition. It may be that the device—knee-action swing diffusers—used in sewage treatment systems does not comprise a relevant market. There may be effective substitutes for the device which do not infringe the patent. This is a matter of proof, as is the amount of damages suffered by Walker.

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[5] This conclusion applies with equal force to an assignee who maintains and enforces the patent with knowledge of the patent's infirmity.

As respondent points out, Walker has not clearly articulated its claim. It appears to be based on a concept of *per se* illegality under § 2 of the Sherman Act. But in these circumstances, the issue is premature. As the Court summarized in *White Motor Co.* v. *United States*, 372 U. S. 253 (1963), the area of *per se* illegality is carefully limited. We are reluctant to extend it on the bare pleadings and absent examination of market effect and economic consequences.

However, even though the *per se* claim fails at this stage of litigation, we believe that the case should be remanded for Walker to clarify the asserted violations of § 2 and to offer proof thereon. The trial court dismissed its suit not because Walker failed to allege the relevant market, the dominance of the patented device therein, and the injurious consequences to Walker of the patent's enforcement, but rather on the ground that the United States alone may "annul or set aside" a patent for fraud in procurement. The trial court has not analyzed any economic data. Indeed, no such proof has yet been offered because of the disposition below. In view of these considerations, as well as the novelty of the claim asserted and the paucity of guidelines available in the decided cases, this deficiency cannot be deemed crucial. Fairness requires that on remand Walker have the opportunity to make its § 2 claims more specific, to prove the alleged fraud, and to establish the necessary elements of the asserted § 2 violation.

Reversed and remanded.

MR. JUSTICE HARLAN, concurring.

I join the Court's opinion. I deem it appropriate, however, to add a few comments to what my Brother CLARK has written because the issue decided is one of first impression and to allay possible misapprehension as to the possible reach of this decision.

We hold today that a treble-damage action for monopolization which, but for the existence of a patent, would be violative of § 2 of the Sherman Act may be maintained under § 4 of the Clayton Act if two conditions are satisfied: (1) the relevant patent is shown to have been procured by knowing and willful fraud practiced by the defendant on the Patent Office or, if the defendant was not the original patent applicant, he had been enforcing the patent with knowledge of the fraudulent manner in which it was obtained; and (2) all the elements otherwise necessary to establish a § 2 monopolization charge are proved. Conversely, such a private cause of action would *not* be made out if the plaintiff: (1) showed no more than invalidity of the patent arising, for example, from a judicial finding of "obviousness," or from other factors sometimes compendiously referred to as "technical fraud"; or (2) showed fraudulent procurement, but no knowledge thereof by the defendant; or (3) failed to prove the elements of a § 2 charge even though he has established actual fraud in the procurement of the patent and the defendant's knowledge of that fraud.

It is well also to recognize the rationale underlying this decision, aimed of course at achieving a suitable accommodation in this area between the differing policies of the patent and antitrust laws. To hold, as we do, that private suits may be instituted under § 4 of the Clayton Act to recover damages for Sherman Act monopolization knowingly practiced under the guise of a patent procured by deliberate fraud, cannot well be thought to impinge upon the policy of the patent laws to encourage inventions and their disclosure. Hence, as to this class of improper patent monopolies, antitrust remedies should be allowed room for full play. On the other hand, to hold, as we do not, that private antitrust suits might also reach monopolies practiced under patents that for one reason or another may turn out to be voidable under one or more of the numerous technicalities attending the issuance of a patent, might well chill the disclosure of inventions through the obtaining of a patent because of fear of the vexations or punitive consequences of treble-damage suits. Hence, this private antitrust remedy should not be deemed available to reach § 2 monopolies carried on under a nonfraudulently procured patent.

These contrasting factors at once serve to justify our present holding and to mark the limits of its application.

HANNA MINING CO. ET AL. v. DISTRICT 2, MARINE ENGINEERS BENEFICIAL ASSOCIATION, AFL-CIO, ET AL.

CERTIORARI TO THE SUPREME COURT OF WISCONSIN.

No. 7. Argued October 12, 1965.—Decided December 6, 1965.

Petitioners (Hanna) operate cargo vessels on the Great Lakes in interstate and foreign commerce. While negotiating for a new collective bargaining agreement with respondent Association (MEBA), which represented the licensed marine engineers on the ships, petitioners assertedly were informed by a majority of the engineers that they did not wish to be represented by MEBA. Hanna declined to negotiate until MEBA's majority status was determined by secret ballot, and MEBA replied by picketing Hanna's ships at Duluth and other ports, causing dock workers to refuse to unload. Hanna turned to the National Labor Relations Board (NLRB): (1) It petitioned the Cleveland Regional Director to hold a representation election among its engineers to determine MEBA's status. The petition was dismissed on the ground that the engineers were "supervisors" and not "employees" under § 2 (3) of the National Labor Relations Act. The NLRB upheld this decision. (2) It filed charges with the Minneapolis Regional Director alleging that MEBA violated § 8 (b) (4) (B) of the Act by inducing work stoppages among dockers at Duluth through improper secondary pressure. These charges were dismissed and the General Counsel agreed, stating that MEBA's conduct at Duluth and other sites did not exceed the bounds of lawful picketing under the NLRB's standards. (3) It filed charges with the Cleveland Regional Director accusing MEBA of organizational or recognitional picketing prohibited by § 8 (b) (7) of the Act. The General Counsel affirmed the dismissal of the charges on the ground that MEBA fell outside the section since it sought to represent supervisors rather than employees. When shipping resumed in the spring and MEBA picketed Hanna ships in Superior, Hanna sued in a Wisconsin circuit court for injunctive relief from the picketing under state law. The Circuit Court dismissed for lack of subject matter jurisdiction and the state Supreme Court affirmed, holding that although the picketing could be deemed illegal under state law, it arguably violated §§ 8 (b) (4) (B) and

8 (b)(7) of the Act and fell within the NLRB's exclusive jurisdiction under *San Diego Unions* v. *Garmon,* 359 U. S. 236. ***Held:***

1. Under *Garmon* a State may not regulate conduct arguably "protected by § 7, or prohibited by § 8" of the Act, and the legislative purpose may require that certain activity neither protected nor prohibited be deemed privileged against state regulation. P. 187.

2. The NLRB decision that the marine engineers are supervisors and not "employees" eliminates most of the opportunities for preemption in this case. P. 188.

(a) Organizational or recognitional activity aimed at supervisors cannot be protected by § 7 of the Act, arguably or otherwise. P. 188.

(b) Situations in which such activity can be prohibited by the Act are fewer than would be the case if "employees" were being organized or seeking recognition. P. 188.

(c) There can be no breach of § 8 (b)(7), which limits organizational or recognitional picketing, since it applies only to picketing directed at "employees." P. 188.

3. The enactment of § 14 (a) of the Act was not a congressional decision to exclude state regulation of supervisory organizing. Pp. 189–190.

4. The NLRB's statement accompanying its refusal to order a representation election settles the supervisory status of the engineers "with unclouded legal significance," so as to avoid preemption in the respects discussed. P. 190.

5. Section 8 (b)(4)(B) does not provide a ground for preemption in the circumstances of this case. Pp. 191–194.

(a) Petitioners claim there is no arguable violation on the basis of the finding of the Regional Director and General Counsel in declining to issue a complaint under § 8 (b)(4)(B) with respect to the 1962 picketing. The General Counsel has statutory "final authority, on behalf of the Board" in the issuance of complaints, and his explicated determinations are entitled to great weight. Pp. 191–192.

(b) Hanna has offered to prove that the 1963 picketing at Superior was the same as the 1962 picketing at Superior, and if such proof is furnished, the chance that the picketing sought to be enjoined conceals a § 8 (b)(4)(B) violation is remote. P. 192.

(c) Even if a § 8 (b) (4) (B) violation were present, there would in this instance be no danger by a state injunction to interests served by the *Garmon* doctrine since the workers sought to be organized are outside the scope of the Act. Pp. 192–193.

(d) The presence of a § 8 (b) (4) (B) violation would not result in the NLRB's affording complete protection to the legitimate interests of the State, as the primary picketing proviso of § 8 (b) (4) (B) inhibits the use of that section fully to deal with the conduct complained of in this case. P. 194.

23 Wis. 2d 433, 127 N. W. 2d 393, reversed and remanded.

John H. Hanninen argued the cause for petitioners. With him on the brief was *Lucian Y. Ray*.

Lee Pressman argued the cause for respondents. With him on the brief was *David Scribner*.

Acting Solicitor General Spritzer, Arnold Ordman, Dominick L. Manoli, Norton J. Come and *Laurence S. Gold* filed a brief for the United States, as *amicus curiae*, urging reversal.

MR. JUSTICE HARLAN delivered the opinion of the Court.

The present controversy once again brings before the Court the troublesome question of where lies the line between permissible and federally preempted state regulation of union activities.

I.

Petitioners ("Hanna") are four corporations whose integrated fleet of Great Lakes vessels carries cargo in interstate and foreign commerce and is operated by one of the four, the Hanna Mining Company. The respondent District 2, Marine Engineers Beneficial Association ("MEBA")[1] represented the licensed marine engineers in Hanna's fleet under a collective bargaining agreement terminating on July 15, 1962. According to Hanna, while negotiations for a new contract continued during August 1962, a majority of the marine engineers informed Hanna by written petitions that they did not wish to be represented by MEBA. Hanna then declined to negotiate further until MEBA's majority status was established by a secret ballot. Without acquiescing in this proposal or questioning any of the employee signatures on the petitions, MEBA responded on September 12, 1962, by picketing one of Hanna's ships unloading at a dock in Duluth, Minnesota, with signs giving the ship's name, stating that Hanna unfairly refused to negotiate with MEBA, and indicating that no dispute existed with any other employer. Because of the continued picketing, dock workers refused day after day to unload the ship. From September 12 until shipping ended for the winter, MEBA similarly picketed Hanna ships at other Great Lakes ports, including Superior, Wisconsin.

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[1] The remaining respondents are officers, agents, and representatives of MEBA, and what is said of it in this opinion applies equally to them.

Hanna turned first to the National Labor Relations Board. On September 12, it petitioned the Regional Director at Cleveland, Ohio, to hold a representation election among Hanna's engineers to prove or disprove MEBA's majority status. The petition was dismissed at the end of September on the stated ground that the engineers were "supervisors" under § 2 (11) of the National Labor Relations Act,[2] and automatically excluded from the Act's definition of "employees" under § 2 (3),[3] so election proceedings under § 9 were not warranted;[4] giving the same reason, the Board in November declined to overturn this decision.[5] As a second measure, Hanna on September 15, 1962, filed charges with the Regional Director in Minneapolis, Minnesota, alleging that MEBA had violated § 8 (b)(4)(B) of the Act,[6] by inducing work stoppages among dockers at Duluth through improper secondary pressure. In October, the Regional Director dismissed the charges and the General Counsel sustained the dismissal in December, stating that MEBA's conduct

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[2] National Labor Relations Act, as amended, § 2 (11), 61 Stat. 138, 29 U. S. C. § 152 (11) (1964 ed.), gives a functional definition of the term "supervisor."

[3] National Labor Relations Act, as amended, § 2 (3), 61 Stat. 137, 29 U. S. C. § 152 (3) (1964 ed.), provides in relevant part that the "term 'employee' . . . shall not include . . . any individual employed as a supervisor . . . ."

[4] National Labor Relations Act, as amended, § 9, 61 Stat. 143, 29 U. S. C. § 159 (1964 ed.), pertinently provides in subsection (c) that petitions may be entertained and elections ordered to deter-

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mine "the representative defined in subsection (a) of this section"; and subsection (a) pertinently provides that "[r]epresentatives designated or selected . . . by the majority of the employees in a unit . . . shall be the exclusive representatives of all the employees in such unit" for collective bargaining purposes.

[5] In relevant part the Board's letter stated that as the "appeal makes no affirmative claim that a majority of the 'employees' as distinguished from 'supervisors' are sought to be represented in an appropriate unit and as a unit of supervisors is otherwise inappropriate, no question concerning representation in an appropriate unit exists." While this pronouncement could be clearer, the parties do not dispute that it affirms or refuses to disturb the Regional Director's explicit finding.

[6] National Labor Relations Act, as amended, § 8 (b)(4)(B), 73 Stat. 542, 29 U. S. C. § 158 (b)(4)(B) (1964 ed.), provides in relevant part that it shall be an unfair labor practice for a labor organization or its agents:

"(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to . . . transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services . . . where . . . an object thereof is—

. . . . .

"(B) forcing or requiring any person to cease . . . handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless . . . certified . . . . *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing."

at Duluth and at other sites investigated did not exceed the bounds of lawful picketing under the Board's standards.[7] Hanna's third and last appeal to the Board came on September 27, 1962, when it filed charges with the Regional Director in Cleveland, Ohio, accusing MEBA of organizational or recognitional picketing improper under § 8 (b)(7) of the Act.[8] The Regional Director dismissed the charge in October and in the next two months the General Counsel affirmed the dismissal because in seeking to represent "supervisors" rather than "employees" MEBA fell outside the section.[9]

Winter brought an end to both shipping and picketing for several months but when the navigation season opened in the spring of 1963 MEBA pickets once more appeared. After picketing occurred at Superior, Wisconsin, Hanna filed suit on June 24, 1963, in a Wisconsin circuit court. The complaint and affidavits alleged that MEBA was picketing Hanna's vessels at the docks of the Great Northern Railway Company at Superior in the same manner as the 1962 picketing and with the same improper aim of forcing its representation on unwilling engineers; Hanna stated that workers of other employers were refusing to render service to Hanna's vessels and it prayed for injunctive relief against further picketing of the vessels and the docks where they berthed and against any other attempt of MEBA to impose representation on Hanna engineers. The Circuit Court dismissed the suit in July for lack of jurisdiction over the subject matter. In April 1964 the Wisconsin Supreme Court affirmed the decision. 23 Wis. 2d 433, 127 N. W. 2d 393. While agreeing that the picketing could be deemed illegal under Wisconsin law,[10] that court held that the picketing arguably violated §§ 8 (b)(4)(B) and 8 (b)(7) of the federal labor Act and so fell within the Board's exclusive jurisdiction marked out in *San Diego Unions* v. *Garmon,* 359 U. S. 236. In light of other language in *Garmon* the Wisconsin Supreme Court held that the General Counsel's dismissal of charges under §§ 8 (b)(4)(B) and 8 (b)(7) did not foreclose the possibility of a preempting violation, even assuming the 1963 picketing in Superior mirrored the 1962 picketing in Duluth. We invited the views of the United States, 379 U. S. 942, granted certiorari, 380 U. S. 941, and now reverse and remand.

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[7] The letter from the General Counsel's office stated in part: "[T]he evidence revealed that the picketing by MEBA at the common situs herein conformed to Moore Dry Dock standards . . . . Furthermore, MEBA's activity at other sites did not evince an unlawful object on the part of the Union inconsistent with the ostensibly primary object of the picketing at the situs of the dispute."

[8] National Labor Relations Act, as amended, § 8 (b)(7), 73 Stat. 544, 29 U. S. C. § 158 (b)(7) (1964 ed.), provides, excluding portions and exceptions not here relevant, that it is an unfair labor practice for a labor organization or its agents to picket any employer with an object of forcing "an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization" as their bargaining agent unless such labor organization is certified or seeks certification.

[9] A second, clarifying letter from the General Counsel's office stated in part: "Our disposition of this case was predicated solely on our conclusion that the supervisory status of the licensed engineers precluded a finding that the Union's picketing and other activity was for an object proscribed by Section 8 (b)(7) of the Act."

II.

The ground rules for preemption in labor law, emerging from our *Garmon* decision, should first be briefly summarized: in general, a State may not regulate conduct arguably "protected by § 7, or prohibited by § 8" of the National Labor Relations Act, see 359 U. S., at 244–246; and the legislative purpose may further dictate that certain activity "neither protected nor prohibited" be deemed privileged against state regulation, cf. 359

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[10] See *Vogt, Inc.* v. *International Brotherhood,* 270 Wis. 321a, 74 N. W. 2d 749, aff'd *sub nom. Teamsters Union* v. *Vogt, Inc.,* 354 U. S. 284.

U. S., at 245. For the reasons that follow, we believe the Board's decision that Hanna engineers are supervisors removes from this case most of the opportunities for preemption.

When in 1947 the National Labor Relations Act was amended to exclude supervisory workers from the critical definition of "employees," § 2 (3), it followed that many provisions of the Act employing that pivotal term would cease to operate where supervisors were the focus of concern. Most obviously, § 7 no longer bestows upon supervisory employees the rights to engage in self-organization, collective bargaining, and other concerted activities[11] under the umbrella of § 8 of the Act, as amended, 61 Stat. 140, 29 U. S. C. § 158 (1964 ed.). See *Labor Board* v. *Budd Mfg. Co.,* 169 F. 2d 571. Accordingly, activity designed to secure organization or recognition of supervisors cannot be protected by § 7 of the Act, arguably or otherwise. Compare *Labor Board* v. *Drivers Local Union,* 362 U. S. 274, 279. Correspondingly, the situations in which that same activity can be prohibited by the Act, even arguably, are fewer than would be the case if employees were being organized or seeking recognition. There can be no breach of § 8 (b)(7), curtailing organizational or recognitional picketing, because there cannot exist the forbidden objective of requiring representation of "employees" by the picketing organization. Nor could one even advance the argument unsuccessfully urged in *Drivers Local Union* that § 8 (b)(1)(A), 61 Stat. 141, 29 U. S. C. § 158 (b)(1)(A) (1964 ed.), condemns the picketing as restraint or coercion of employees exercising their § 7 right *not* to organize or bargain collectively.

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[11] National Labor Relations Act, as amended, § 7, 61 Stat. 140, 29 U. S. C. § 157 (1964 ed.), provides that "employees" shall have the right to engage in, or in general to refrain from, the mentioned activities.

Even though such efforts to unionize supervisors are not protected by the Act, or in the respects immediately relevant prohibited by it, the question arises whether Congress nonetheless desired that in their peaceful facets these efforts remain free from state regulation as well as Board authority. Compare *Teamsters Union* v. *Morton,* 377 U. S. 252, 258–260. Arguing that the States are indeed powerless in this respect, MEBA pitches its case chiefly on the 1947 amendment of the "employee" definition and on the concurrent enactment of § 14 (a) of the Act, 61 Stat. 151, 29 U. S. C. § 164 (a) (1964 ed.), which provides in relevant part that "[n]othing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization . . . ." It is contended that the amendment and this section signify a federal policy of *laissez faire* toward supervisors ousting state as well as Board authority and, more particularly, that to allow the Wisconsin injunction would obliterate the opportunity for supervisor unions that Congress expressly reserved.

This broad argument fails utterly in light of the legislative history, for the Committee reports reveal that Congress' propelling intention was to relieve employers from any compulsion under the Act and under state law to countenance or bargain with any union of supervisory employees.[12] Whether the legislators fully realized that their method of achieving this result incidentally freed supervisors' unions from certain limitations under the newly enacted § 8 (b) is not wholly clear, but certainly Congress made no considered decision generally to exclude state limitations on supervisory organizing. As to the portion of § 14 (a) quoted above, some legislative history suggests that it was not meant to immunize any conduct at all but only to make it "clear that the amendments to the act do not prohibit supervisors from joining unions . . . ." S. Rep. No. 105, 80th Cong., 1st Sess., p. 28; H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 60 ("[T]he first part of this provision [§ 14 (a)] was included presumably out of an abundance of caution."). However, even assuming that § 14 (a) itself intended also to make it clear that state law could not prohibit supervisors from joining unions, the section would have no application to the present facts; for picketing by a minority union to extract recognition by force of such pressures is decidedly not a *sine qua non* of collective bargaining, as indeed its limitation by § 8 (b)(7) in nonsupervisor situations attests.

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[12] Summarizing the impact of the new measure on supervisory personnel, the Senate Report stated: "[T]he bill does not prevent anyone from organizing nor does it prohibit any employer from recognizing a union of foremen. It merely relieves employers who are subject to the national act free from any compulsion by this National Board or any local agency to accord to the front line of management the anomalous status of employees." S. Rep. No. 105, 80th Cong., 1st Sess., p. 5. See also H. R. Rep. No. 245, 80th Cong., 1st Sess., pp. 13–17.

The remaining question in this phase of the case is whether the supervisory status of Hanna's engineers has been settled "with unclouded legal significance," *Garmon*, 359 U. S., at 246, so as to preclude arguable application of the Act in the respects discussed. We hold that the Board's statement accompanying its refusal to order a representation election does resolve the question with the clarity necessary to avoid preemption. While MEBA does not contend that the Board erred in its determination, an abstract difficulty arises from the lack of a statutory channel for judicial review of such a Board decision. Compare *Hotel Employees* v. *Leedom*, 358 U. S. 99 (equity action to obtain election). However, the usual deference to Board expertise in applying statutory terms to particular facts assures that its decision would in any event be respected in a high percentage of instances, and so diminished a risk of interference with federal labor policy does not justify use of the preemption doctrine to thwart state regulation bound to be legitimate on this score in almost all cases.

III.

A further basis for preemption, urged by MEBA and adopted by the Wisconsin Supreme Court, is that the picketing at Superior exerted secondary pressure arguably violating § 8 (b)(4)(B). The argument appears to be that a state injunction banishing the pickets inevitably impinges upon the Board's authority to regulate facets of the picketing that might exceed "primary" picketing and violate § 8 (b)(4)(B)[13]—facets never specified by MEBA but presumably those that ignore the Board's limitations on time, location, and manner of common situs picketing. See *Sailors' Union of the Pacific* (*Moore Dry Dock*), 92 N. L. R. B. 547. However, as will appear, no arguable violation exists if Hanna's proof lives up to its allegations; further, even assuming a violation, federal interests normally justifying preemption are absent from this case.

Hanna's claim that there is no arguable violation rests, of course, on the finding made by the Regional Director and the General Counsel in declining to issue a complaint under § 8 (b)(4)(B) with respect to MEBA's 1962 picketing. The Wisconsin Supreme Court refused to credit this finding because of this Court's comment in *Garmon* that the "refusal of the General Counsel to file a charge" is one of those dispositions "which does not define the nature of the activity with unclouded legal significance." 359 U. S., at 245-246. This language allows more than one interpretation, but we take it not to apply to those refusals of the General Counsel which are illuminated by explanations that do squarely define the nature of the activity. The General Counsel has statutory "final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints," § 3 (d) of the Act, as amended, 61 Stat. 139, 29 U. S. C. § 153 (d) (1964 ed.), and his pronouncements in this context are entitled to great weight. The usual inability of the charging party to contest the General Counsel's adverse decision in the courts, see *Hourihan* v. *Labor Board,* 91 U. S. App. D. C. 316, 201 F. 2d 187, does to be sure create a slight risk if state courts may proceed on this basis, but in the context of this case we believe the risk is too minimal to deserve recognition.

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[13] By contrast, sometimes offensive conduct may be restrained by a state remedy that has no impact at all on related activity arguably within the Board's exclusive province. See, *e. g., Youngdahl* v. *Rainfair, Inc.*, 355 U. S. 131, upholding a state injunction against violence but setting it aside so far as it reached peaceful picketing.

Even taking the General Counsel's ruling at face value, MEBA stresses that the § 8 (b)(4)(B) charge by Hanna concerned picketing in Duluth in September 1962 while the picketing before the Wisconsin court occurred at Superior in spring 1963. Yet Hanna accompanied the 1962 charge with information as to the 1962 picketing in several ports including Superior. The Regional Director is said to have conducted an investigation in Superior as well as in Duluth, and the General Counsel's letter on the § 8 (b)(4)(B) charge appeared to state that activity at the sites other than Duluth also did not violate the Act. See n. 7, *supra.* And while some months intervened between the fall 1962 picketing at Superior and its resumption at that port in spring 1963, Hanna has offered to prove that the picketing remained the same in all significant respects including the picket signs employed, the location of the pickets, and the pickets' general behavior. If this proof is furnished, the chance that the picketing sought to be enjoined conceals a § 8 (b)(4)(B) violation seems remote indeed.

Additionally, even if a § 8 (b)(4)(B) violation were present, central interests served by the *Garmon* doctrine are not endangered by a state injunction when, in an instance such as this, the Board has established that the workers sought to be organized are outside the regime of the Act. Cf. *Incres S. S. Co.* v. *Maritime Workers,* 372 U. S. 24. Most importantly, the Board's decision on the supervisory question determines, as we have already shown, that none of the conduct is arguably protected nor does it fall in some middle range impliedly withdrawn from state control.[14] Consequently, there is wholly absent the greatest threat against which the *Garmon* doctrine guards, a State's prohibition of activity that the Act indicates must remain unhampered.[15]

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[14] Aside from the §14 (a) line of argument already answered, we do not find at all apposite *Teamsters Union* v. *Morton,* 377 U. S. 252, holding a State powerless to award damages against a striking union for requesting a secondary employer to cease business with the struck employer. While in *Morton* preemption was premised on the fact that the secondary pressure did not come within the ban fixed by § 8 (b) (4) (B) and adopted by § 303 (a) of the Labor Management Relations Act, as amended, 73 Stat. 545, 29 U. S. C. § 187 (a) (1964 ed.), the conduct there occurred in the context of a peaceful economic strike by employees, a sphere in which the federal interest is especially pervasive. By contrast the present case, involving secondary pressure wielded to impose representation on unwilling supervisors, finds itself at that far corner of labor law where, as we have shown, federal occupation is at a minimum and state power at a peak.

[15] *Hattiesburg Unions* v. *Broome Co.,* 377 U. S. 126, cited to us by MEBA, may illustrate this concern. There, the union's organizational picketing at a common situs was enjoined by the State because its objective violated state law. In urging that the picketing's possible violation of § 8 (b) (4) (B) preempted state authority, the Solicitor General suggested that it may also have been "lawful picketing" outside the State's reach so far as not prohibited by the section. Memorandum, p. 6, n. 7. See also Michelman, State Power To Govern Concerted Employee Activities, 74 Harv. L. Rev. 641, 652–653 (1961) (citations omitted): "[A] state generally may not enjoin conduct thought to be a federal unfair labor practice. The reason is that, despite the state court's contrary belief, the conduct may, as a matter of federal law, be privileged."

Nor is this a case in which the presence of arguably prohibited activity may permit the Board to afford complete protection to the legitimate interests advanced by the State. Since Hanna as the primary employer is present at the picketed situs, the primary picketing proviso of § 8 (b)(4)(B) severely inhibits the Board's use of that section to reach the volatile core of the conduct, the impact on secondary employers that follows from the mere presence of the pickets at a common situs. Section 8 (b)(7) which might provide full relief is rendered inapplicable by the supervisor ruling. Thus, so far as *Garmon* may proceed on the view that the opportunity belongs to the Board wherever it and the State offer duplicate relief, it has limited application to the present facts.[16]

In concluding that the Act does not preempt the State's authority to quench the picketing said to have occurred in this case, we do not retreat from *Garmon.* Rather, we consider that neither the terms nor the policies of that decision justify its extension to the present facts, an extension producing untoward results noted by the Wisconsin Supreme Court itself. 23 Wis. 2d 433, 446, 127 N. W. 2d 393, 399.

The judgment of the Supreme Court of Wisconsin is reversed and the case is remanded to that court for proceedings not inconsistent with this opinion.

It is so ordered.

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[16] In *Marine Engineers* v. *Interlake Co.,* 370 U. S. 173, we overturned a state ban on picketing arguably violating § 8 (b)(4)(B); and to the counterargument that the picketing group was not a "labor organization" subject to § 8 (b), we pointed out that this decision was for the Board. Unlike the present case, in *Interlake* the § 8 (b) (4)(B) remedy had not been tried; but quite apart from that consideration, had the Board held the union a "labor organization" and also held those being organized to be "employees"—another point not recently decided by the Board—complete relief against the picketing might well have been available under § 8 (b)(7). See 370 U. S., at 182–183.

MR. JUSTICE BRENNAN, concurring.

I agree with the Court that § 14 (a) does not evince a congressional decision to exclude state regulation of picketing aimed at organizing supervisors and securing the employer's recognition of the union. The question here, however, is whether Congress has excluded state regulation when that picketing also has secondary aspects arguably within the reach of § 8 (b)(4)(B). I agree with the Court that state regulation is likewise not precluded in such case.

The proviso to § 8 (b)(4)(B) expressly states "[t]hat nothing contained in this clause (B) shall be construed to make unlawful, *where not otherwise unlawful,* any primary strike or primary picketing." (Emphasis supplied.) While Congress thus provided that primary picketing is not rendered unlawful under the Act merely by having secondary aspects, the italicized words of the proviso evince a congressional intention to leave undisturbed whatever other provisions of law regulate primary picketing. Ordinarily such regulation occurs under the National Labor Relations Act. The primary aspects of supervisory picketing are not, however, regulated by the federal Act; and I think the assumption that regulation will occur, which underlies the italicized words of the proviso, is strong enough to support the Court's conclusion that state regulation of supervisory organizational picketing is not preempted.*

It is true that we said in *Garmon* that States have no power to regulate "activities" arguably subject to the federal Act; picketing which, because of its secondary aspects, is arguably subject to § 8 (b)(4)(B) is, by one construction, an "activity." But *Garmon* was not a case in which only incidental aspects of picketing were arguably subject to federal power and in which the alternative to state regulation was a regulatory void which Congress plainly assumed would not exist. In this limited context, it is permissible to distinguish the primary from the secondary aspects of the picketing, and hold that the States may regulate the former, although preempted as to the latter, and although the necessary effect of regulation curbs both secondary and primary aspects of the picketing. This choice seems more consistent with the congressional meaning, since the alternative is to immunize the primary aspects of such common-situs picketing from state regulation, and that alternative finds no support either in policy or in the statute. Thus, I think that the Wisconsin courts may consider so much of the complaint as is addressed to the primary aspects of MEBA's picketing.

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*It could be argued that this assumption supports a scope of state regulation no broader than that ordinarily provided by the federal Act. It is not necessary to resolve that argument here.

UNITED STATES *v.* HUCK MANUFACTURING CO. ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN.

No. 8. Argued November 15, 1965.—Decided December 6, 1965.

227 F. Supp. 791, affirmed.

Assistant Attorney General Turner argued the cause for the United States. With him on the brief were *Acting Solicitor General Spritzer, Frank Goodman* and *Robert B. Hummel.*

Dennis G. Lyons and *Thomas W. Pomeroy, Jr.*, argued the cause for appellees. With them on the brief were *Paul A. Porter, William L. McGovern, John A. Blair, S. K. McCune* and *W. Walter Braham, Jr.*

PER CURIAM.

Judgment affirmed by an equally divided Court.

MR. JUSTICE FORTAS took no part in the consideration or decision of this case.

ROGERS ET AL. *v.* PAUL ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 532. Decided December 6, 1965.

This class action to effect pupil and faculty desegregation of the Fort Smith, Arkansas, high schools was brought several years ago by petitioners, two Negro students. The courts below refused to order respondents to transfer petitioners or to order immediate desegregation of the high schools and it was also held that petitioners had no standing to challenge racial faculty allocation. Since one of the students had graduated during the pendency of the suit, and the other had reached the 12th grade, two other Negro students, one in the 10th grade and the other in the 11th grade, moved in this Court to be added as party plaintiffs. *Held:*

1. The motion to add parties is granted.

2. The assignment of petitioners to a Negro high school on the basis of race is constitutionally prohibited, both for the reasons stated in *Brown* v. *Board of Education,* 347 U. S. 483, and because petitioners are prevented from taking courses offered only at another school limited to white students. Pending immediate desegregation of the high schools according to a general plan, petitioners and those similarly situated shall be allowed immediate transfer to the high school from which they were excluded because of race and which has the more extensive curriculum.

3. Under two theories, the first of which plainly applies, students not yet in desegregated grades would have standing to challenge racial faculty allocation: Such allocation (a) of itself denies them equality of educational opportunity, and (b) renders inadequate an otherwise constitutional pupil desegregation plan soon to be applied to their grades.

Certiorari granted; 345 F. 2d 117, vacated and remanded.

Jack Greenberg, James M. Nabrit III, Derrick A. Bell, Jr., and *George Howard, Jr.,* for petitioners.

John P. Woods for respondents.

PER CURIAM.

The petition for writ of certiorari to the Court of Appeals for the Eighth Circuit and the motion to add parties are granted. The judgment of that court is vacated and the case is remanded to the District Court for the Western District of Arkansas for further proceedings consistent with this opinion.

1. This class action to desegregate the public high schools of Fort Smith, Arkansas, was commenced several years ago in the name of two Negro students. One of the students has since graduated and the other has entered the last high school grade. A motion to add parties is made on behalf of two additional Negro students. It is alleged therein, and not denied by respondents, that these students are in the 10th and 11th grades of high school and that they are members of the class represented, seeking the same relief for all the reasons offered by the original party plaintiffs. That motion is accordingly granted.

2. The desegregation plan adopted in 1957 desegregates only one grade a year and the 10th, 11th and 12th high school grades are still segregated. The students who are petitioners here were assigned to a Negro high school on the basis of their race.* Those assignments are constitutionally forbidden not only for the reasons stated in *Brown* v. *Board of Education,* 347 U. S. 483, but also because petitioners are thereby prevented from taking certain courses offered only at another high school limited to white students, see *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337; *Sipuel* v. *Board of Regents,* 332 U. S. 631; *Sweatt* v. *Painter,* 339 U. S. 629. Petitioners are entitled to immediate relief; we have emphasized that "[d]elays in desegregating school systems are no longer tolerable." *Bradley* v. *School Board, ante,* p. 103, at 105. Pending the desegregation of the public high

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*The constitutional adequacy of the method chosen for assigning students to the schools for purpose of desegregating the lower grades is not before us, and the method contemplated for the high schools is not part of the record.

schools of Fort Smith according to a general plan consistent with this principle, petitioners and those similarly situated shall be allowed immediate transfer to the high school that has the more extensive curriculum and from which they are excluded because of their race.

3. From the outset of these proceedings petitioners have challenged an alleged policy of respondents of allocating faculty on a racial basis. The District Court took the view that petitioners were without standing to challenge the alleged policy, and accordingly refused to permit any inquiry into the matter. The Court of Appeals sustained this ruling, holding that only students presently in desegregated grades would have the standing to make that challenge. 345 F. 2d 117, 125. We do not agree and remand for a prompt evidentiary hearing on this issue.

Even the Court of Appeals' requirement for standing would be met on remand since petitioners' transfer to the white high school would desegregate their grades to that limited extent. Moreover, we reject the Court of Appeals' view of standing as being unduly restrictive. Two theories would give students not yet in desegregated grades sufficient interest to challenge racial allocation of faculty: (1) that racial allocation of faculty denies them equality of educational opportunity without regard to segregation of pupils; and (2) that it renders inadequate an otherwise constitutional pupil desegregation plan soon to be applied to their grades. See *Bradley* v. *School Board, supra.* Petitioners plainly had standing to challenge racial allocation of faculty under the first theory and thus they were improperly denied a hearing on this issue.

Vacated and remanded.

MR. JUSTICE CLARK, MR. JUSTICE HARLAN, MR. JUSTICE WHITE and MR. JUSTICE FORTAS would set the case down for argument and plenary consideration.

GEORGE F. HAZELWOOD CO. *v.* PITSENBARGER, ASSESSOR.

APPEAL FROM THE SUPREME COURT OF APPEALS OF WEST VIRGINIA.

No. 567. Decided December 6, 1965.

149 W. Va. 485, 141 S. E. 2d 314, appeal dismissed.

Joseph A. Blundon for appellant.

C. Donald Robertson, Attorney General of West Virginia, and *George H. Mitchell* and *J. Patrick Bower,* Assistant Attorneys General, for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

MARCHEV ET UX. *v.* TOWNSHIP OF LIVINGSTON.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

No. 571. Decided December 6, 1965.

44 N. J. 412, 209 A. 2d 145, appeal dismissed.

James T. Dowd for appellants.

PER CURIAM.

The appeal is dismissed for want of a substantial federal question.

CALIFORNIA DEMOCRATIC COUNCIL ET AL. *v.* ARNEBERGH ET AL.

APPEAL FROM THE DISTRICT COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT.

No. 583. Decided December 6, 1965.

233 Cal. App. 2d 425, 43 Cal. Rptr. 531, appeal dismissed.

Leon M. Cooper for appellants.

Thomas C. Lynch, Attorney General of California, *Charles A. Barrett,* Assistant Attorney General, *Sanford N. Gruskin,* Deputy Attorney General, *Harold W. Kennedy, Roger Arnebergh, pro se,* and *Bourke Jones* for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

NEHRING *v.* GERRITY.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

No. 614. Decided December 6, 1965.

31 Ill. 2d 608, 203 N. E. 2d 402, appeal dismissed and certiorari denied.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

MISANI *v.* ORTHO PHARMACEUTICAL CORP. ET AL.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

No. 595. Decided December 6, 1965.

44 N. J. 552, 210 A. 2d 609, appeal dismissed and certiorari denied.

Appellant *pro se.*

Clyde A. Szuch and *Stanley C. Smoyer* for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

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508 CHESTNUT, INC. *v.* CITY OF ST. LOUIS ET AL.

APPEAL FROM THE SUPREME COURT OF MISSOURI.

No. 605. Decided December 6, 1965.

389 S. W. 2d 823, appeal dismissed.

Morris A. Shenker and *Bernard J. Mellman* for appellant.

Thomas F. McGuire and *Aubrey B. Hamilton* for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

SOLOMON *v.* SOUTH CAROLINA.

APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA.

No. 588. Decided December 6, 1965.

245 S. C. 550, 141 S. E. 2d 818, appeal dismissed.

Ellis Lyons for appellant.

Daniel R. McLeod, Attorney General of South Carolina, and *E. N. Brandon,* Assistant Attorney General, for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

MR. JUSTICE DOUGLAS is of the opinion that the judgment should be reversed on the authority of *Sherbert* v. *Verner*, 374 U. S. 398. And see *McGowan* v. *Maryland,* 366 U. S. 420, 561, 577 (dissenting opinion).

MR. JUSTICE BRENNAN and MR. JUSTICE STEWART are of the opinion that probable jurisdiction should be noted.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL–CIO, LOCAL 283 *v.* SCOFIELD ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 18. Argued October 20, 1965.—Decided December 7, 1965.*

In No. 18, a union was charged by individual employees with violations of the National Labor Relations Act, and the Board's General Counsel issued a complaint. The NLRB dismissed the complaint after a hearing and the individual employees sought review in the Court of Appeals. The NLRB filed an answer supporting the decision. A motion of intervention filed by the union, although not opposed by the NLRB or the employees, was denied by the court. The union was permitted to file a brief as *amicus curiae*. In No. 53, a union filed charges against a company and the Board's General Counsel issued a complaint. After a hearing the NLRB issued a cease-and-desist order against the company, which petitioned for review in the Court of Appeals. The NLRB cross-petitioned for enforcement and the union moved to intervene. Both the company and the NLRB opposed intervention. The court denied the motion and authorized the union to file an *amicus* brief. Certiorari was granted in both cases. *Held:*

1. Although under 28 U. S. C. § 1254 (1) only a "party" to a case in the Court of Appeals (which does not include an *amicus curiae*) may seek review here, our decision makes clear that the petitioners had a right to obtain review of the orders denying intervention. Pp. 208–209.

2. The successful charged party in NLRB proceedings has the right to intervene in appellate proceedings brought by the unsuccessful charging party. Pp. 209–217.

(a) While the Act does not specifically provide for intervention at the appellate level, most courts have recognized the right of the successful charged party to intervene. P. 211.

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*Together with No. 53, *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, Local 133, UAW, AFL–CIO* v. *Fafnir Bearing Co. et al.*, on certiorari to the United States Court of Appeals for the Second Circuit.

(b) To permit such intervention in the initial appellate review proceedings will avoid duplication of proceedings, adhere to the goal of obtaining just results with a minimum of technical requirements, accomplish the objective of prompt determination of labor disputes, insure fairness to the would-be intervenor, and will not affect this Court's discretionary review powers nor delay or complicate appellate procedures. Pp. 212–216.

(c) The element of fortuity, whereby the unsuccessful charged party has a right to review but the successful charged party does not, is removed. Pp. 216–217.

(d) Analogies in the Judicial Review Act of 1950, and the Federal Rules of Civil Procedure manifest congressional concern that interested private parties be given a right to intervene and participate in agency review proceedings. Pp. 216–217.

3. The successful charging party in NLRB proceedings also has the right to intervene in the appellate review. Pp. 217–222.

(a) A successful charging party, being not only a member of the general public whose interests are protected by the NLRB but also one with vital private interests which are involved and protected by the Act in its blending of both interests, is entitled to recognition as a party in appellate proceedings. *Amalgamated Util. Workers* v. *Consolidated Edison Co.,* 309 U. S. 261, distinguished. Pp. 219–221.

(b) When the court rules on the merits of an NLRB order, the Act supports the view that the court and not the agency defines the public interest. P. 221.

(c) This Court, and not the Labor Board, is the body having discretion to decide which cases are suitable vehicles to raise important issues on certiorari. P. 221.

(d) As in the case of the charged party, the successful charging party should have the same right as an unsuccessful party in appearing before an appellate court. P. 222.

No. 53, 339 F. 2d 801, and No. 18, reversed and remanded.

Joseph L. Rauh, Jr., argued the cause for petitioners in both cases. With him on the briefs were *John Silard, Daniel H. Pollitt, Stephen I. Schlossberg, Eugene Gressman, Harold A. Katz, Irving M. Friedman, Philip L. Padden, William S. Zeman* and *Benjamin Rubenstein.*

Solicitor General Marshall argued the cause for respondents in both cases. With him on the brief for the

National Labor Relations Board were *Ralph S. Spritzer, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come.*

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

The two cases before us present converse sides of a single question—whether parties who are wholly successful in unfair labor practice proceedings before the National Labor Relations Board have a right to intervene in the Court of Appeals review proceedings.

In No. 18 (*Scofield*), the Union Local was charged by four individual employees with violations of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U. S. C. § 151 *et seq.* (1964 ed.), for fining certain Union members for exceeding incentive pay ceilings set by the Union. The General Counsel of the Board issued a complaint. After a full hearing, the Board dismissed the complaint, 145 N. L. R. B. 1097. The individual employees then sought review in the Seventh Circuit. The General Counsel filed an answer supporting the decision. At this point, the Union filed a timely motion of intervention, alleging that it would be directly affected should the appellate court set aside the Board's decision and direct the entry of a remedial order against it. Neither the individual employees nor the Board opposed intervention. A division of the Seventh Circuit denied the motion to intervene, but authorized the Union to file a brief as *amicus curiae* without leave to participate in oral argument. The Union sought review here, and we granted certiorari to review the denial of intervention because of the importance of the issue and the conflict among the courts of appeals, 379 U. S. 959. Further proceedings were stayed pending the completion of our review.

In No. 53 (*Fafnir*), the Local filed unfair labor practice charges against the Fafnir Bearing Company. The charging party alleged that the company had violated its statutory bargaining obligation by refusing to permit the contracting Union to conduct its own time studies of job operations in the plant. The Union allegedly needed to conduct these studies to ascertain whether it should proceed to arbitration. The General Counsel issued a complaint, a hearing was held, and the Board entered a cease-and-desist order against the company, 146 N. L. R. B. 1582. The company petitioned for review in the Second Circuit, and the Board filed a cross-petition for enforcement. The Union—the successful party before the Board—moved to intervene, alleging numerous grounds in support. Both the company and the Board opposed intervention. The Second Circuit denied the motion, although cognizant of the difficulties of the problem, and authorized the Union to file an *amicus* brief. 339 F. 2d 801. We granted certiorari, 380 U. S. 950, and consolidated *Fafnir* with *Scofield* in order to consider both facets of the intervention problem.

We hold that both the successful charged party (in *Scofield*) and the successful charging party (in *Fafnir*) have a right to intervene in the Court of Appeals proceeding which reviews or enforces Labor Board orders. We think that Congress intended to confer intervention rights upon the successful party to the Labor Board proceedings in the court in which the unsuccessful party challenges the Board's decision.

A threshold question concerns our jurisdiction to grant certiorari. Under § 1254 (1) of the Judicial Code,[1] only a "party" to a case in the Court of Appeals may seek review here. In both these cases, the Union seeking certiorari was denied intervention and relegated to the status of an *amicus curiae*. Because an *amicus* is not a "party" to the case, it would not have been entitled to file a petition to review a judgment on the merits by the Court of Appeals, *Ex parte Leaf Tobacco Board,* 222 U. S. 578, 581; *Ex parte Cutting,* 94 U. S. 14, 20–22. In view of our decision herein, we think that § 1254 (1) permits us to review the orders denying intervention. See *Railroad Trainmen* v. *Baltimore & O. R. Co.,* 331 U. S. 519.

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[1] Section 1254 (1), 28 U. S. C. § 1254 (1) (1964 ed.), provides:

"Cases in the courts of appeals may be reviewed by the Supreme Court . . . :

"(1) By writ of certiorari granted upon the petition of any party to any civil . . . case, before or after rendition of judgment or decree."

I.

Congress has made a careful adjustment of the individual and administrative interests throughout the course of litigation over a labor dispute. The Labor Act does not, however, provide explicitly for intervention at the appellate court level. Section 10 (f) of the Act, 61 Stat. 148, as amended, 29 U. S. C. § 160 (f) (1964 ed.), serves as our guide, even though it is silent on the intervention problem. It states, in pertinent part:

> "Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside."

Similarly, no specific standards govern the propriety of intervention in Labor Board review proceedings. The Rules of the Courts of Appeals typically provide: "A person desiring to intervene in a case where the applicable statute does not provide for intervention shall file with the court and serve upon all parties a motion for leave to intervene."[2]

Lacking a clear directive on the subject, we look to the statutory design of the Act. Cf. *Scripps-Howard Radio* v. *Commission,* 316 U. S. 4, 11. Of course, in considering the propriety of intervention in the courts of appeals, our discussion is limited to Labor Board review proceedings. Federal agencies are not fungibles for intervention purposes—Congress has treated the matter with attention to the particular statutory scheme and agency.

In some instances, the words of the statute themselves elicit an answer. When the Board enters a final order against the charged party, it is clear that the phrase "[a]ny person aggrieved" in § 10 (f) enables him to seek immediate review in the appropriate Court of Appeals. Alternatively, if the Board determines that a complaint should be dismissed, the charging party has a statutory right to review as a "person aggrieved." A hybrid situation occurs when the Board dismisses certain portions of the complaint and issues an order on others. As to that portion which results in a remedial order against him, the charged party is aggrieved; likewise, the charging party is aggrieved with respect to the portion of the decision dismissing the complaint. Each one is a "party" in a consolidated appeal, and has invariably been granted leave to intervene with regard to the portion of the order on which the Board found in his favor.[3]

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[2] Second Circuit Rule 13 (f); Seventh Circuit Rule 14 (f). The other circuits which provide for intervention have substantively identical rules: First Circuit Rule 16 (6); Third Circuit Rule 18 (6); Fourth Circuit Rule 27 (6); Sixth Circuit Rule 13 (6); Eighth Circuit Rule 27 (f); Ninth Circuit Rule 34 (6); Tenth Circuit Rule 34 (6); District of Columbia Circuit Rule 38 (f).

[3] *Darlington Mfg. Co.* v. *Labor Board,* 325 F. 2d 682 (C. A. 4th Cir.), vacated and remanded on other grounds, *sub nom. Textile Workers* v. *Darlington Co.,* 380 U. S. 263; *Industrial Union of*

Scofield serves as an example of another variant in review proceedings. The unsuccessful charging party to the Board proceedings petitioned for review, and the successful charged party wished to intervene. The vast majority of the courts have recognized his right to do so.[4] Recognition of intervention rights in this instance is in complete accord with the statements in *Ford Motor Co.* v. *Labor Board*, 305 U. S. 364, 369, 373, that:

> "While § 10 (f) assures to any aggrieved person opportunity to contest the Board's order, it does not require an unnecessary duplication of proceedings. The aim of the Act is to attain simplicity and directness both in the administrative procedure and on judicial review. . . .
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> . . . . .
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> ". . . The jurisdiction to review the orders of the Labor Relations Board is vested in a court with equity powers, and while the court must act within the bounds of the statute and without intruding upon the administrative province, it may adjust its

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Marine & Shipbuilding Workers v. *Labor Board,* 320 F. 2d 615 (C. A. 3d Cir.); *Labor Board* v. *Wooster Div. of Borg-Warner Corp.,* 236 F. 2d 898 (C. A. 6th Cir.); see also *American Newspaper Publishers Assn.* v. *Labor Board,* 190 F. 2d 45 (C. A. 7th Cir.).

[4] *Carrier Corp.* v. *Labor Board,* 311 F. 2d 135 (C. A. 2d Cir.), reversed on other grounds, *sub nom. Steelworkers* v. *Labor Board,* 376 U. S. 492; *Local 1441, Retail Clerks International Assn.* v. *Labor Board,* 326 F. 2d 663 (C. A. D. C. Cir.); *Amalgamated Clothing Workers of America* v. *Labor Board,* 324 F. 2d 228 (C. A. 2d Cir.); *Minnesota Milk Co.* v. *Labor Board,* 314 F. 2d 761 (C. A. 8th Cir.); *Great Western Broadcasting Corp.* v. *Labor Board,* 310 F. 2d 591 (C. A. 9th Cir.); *Selby-Battersby & Co.* v. *Labor Board,* 259 F. 2d 151 (C. A. 4th Cir.); *Kovach* v. *Labor Board,* 229 F. 2d 138 (C. A. 7th Cir.). Contra, *Superior Derrick Corp.* v. *Labor Board,* 273 F. 2d 891 (C. A. 5th Cir.), cert. denied, 364 U. S. 816; *Amalgamated Meat Cutters* v. *Labor Board,* 267 F. 2d 169 (C. A. 1st Cir.), cert. denied, 361 U. S. 863; *Haleston Drug Stores, Inc.* v. *Labor Board,* 190 F. 2d 1022 (C. A. 9th Cir.).

> relief to the exigencies of the case in accordance with the equitable principles governing judicial action. The purpose of the judicial review is consonant with that of the administrative proceeding itself,—to secure a just result with a minimum of technical requirements. . . ."

To allow intervention to the charged party in the first appellate review proceeding is to avoid "unnecessary duplication of proceedings," and to adhere to the goal of obtaining "a just result with a minimum of technical requirements." Analysis of the Act's machinery in practice so indicates. A decision of the reviewing court to set aside a Board order dismissing a complaint has the effect of returning the case to the Board for further proceedings. This normally results in the Board's entering an order against the charged party. From this remedial order, as noted, the charged party is aggrieved and may seek review. Judicial time and energy is then expended in pursuit of issues already resolved in the first appeal.[5] Moreover, the second appeal could lead to undesirable

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[5] There are, of course, cases in which the Court of Appeals will remand to the Board to take additional evidence or to reconsider the order in light of litigational developments. In these cases, there is a greater opportunity for the party originally victorious before the Board successfully to persuade it or the appellate court than in the case in which no additional evidence need be taken. Still, the considerations discussed herein strongly suggest the propriety of intervention in these cases as well, especially since, at the time a motion for leave to intervene is filed, the reviewing court will not be fully apprised of the issues involved in the case.

Then, too, only 12 proceedings in which the Board had entered an order dismissing the complaint and the charging party appealed the dismissal in the Court of Appeals occurred during the 1964 fiscal year. See 29 NLRB Ann. Rep. 201, Table 19 (1964). In eight of these, the Board orders were affirmed in full. *Ibid.* The small caseload gives further support for the notion that the courts of appeals, and the Board, will not be disadvantaged by allowing intervention to the charged party.

"circuit shopping" and useless proliferation of judicial effort. Under § 10 (f), an aggrieved person has the option of obtaining review either in the circuit in which he maintains his residence or place of business or in the Court of Appeals for the District of Columbia Circuit. In the second appellate proceeding, he could obtain a hearing in the circuit which did not originally decide the validity of the Board's dismissal of the complaint. Permitting intervention in the first review thus centralizes the controversy and limits it to a single decision, accelerating final resolution. This is in accord with one of the objectives of the Labor Act—the prompt determination of labor disputes.

Permitting intervention also insures fairness to the would-be intervenor. If intervention is permitted, the parties to the Board proceedings are able to present their arguments on the issues to a reviewing court which has not crystallized its views. To be sure, if intervention is denied in the initial review proceeding, the charged party would not be bound by the decision under technical *res judicata* rules. Still, the salient facts having been resolved and the legal problems answered in this initial review, subsequent litigation serves little practical value to the potential intervenor. In the second appellate proceeding, the Court of Appeals would almost invariably defer to the initial decision as a matter of *stare decisis* or of comity.[6] See, *e. g., Siegel Co.* v. *Labor Board,* 340

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[6] In the rare instance in which the reviewing court does not abide by these principles, an even more aggravated situation could result. In the second review proceeding, if the now-successful charging party is denied intervention and the appellate court takes a different view of the applicable law, the charging party might later have the opportunity to seek review again as a "person aggrieved." Thus, three or even more review proceedings could be engendered out of the failure to permit intervention at the most convenient stage—the initial review proceeding. Such an incongruous result should not be sanctioned in light of our statement in *Ford Motor Co.* v. *Labor*

F. 2d 309; *Zdanok* v. *Glidden Co.*, 327 F. 2d 944, 949–950, cert. denied, 377 U. S. 934.

Allowing intervention does not affect the discretionary review powers of this Court. One occupying the status of intervenor in the Court of Appeals proceeding may seek certiorari from the decision there, *Steelworkers* v. *Labor Board*, 373 U. S. 908, 376 U. S. 492; *Mine Workers* v. *Eagle-Picher Co.*, 325 U. S. 335, 338–339. Denial of intervention in the initial review proceedings—and the attendant remand to the Board and second appeal to the Court of Appeals—only results in a delay of the time when the disaffected party may seek review here. Should we decide to grant certiorari, the first review would seem the more propitious time, since all the parties are then before the Court and the dispute has been fully developed without inconvenience to either private party. *Steelworkers* v. *Labor Board*, 376 U. S. 492, affords an apt illustration. The Court of Appeals had permitted intervention to the charged party who sought review from the adverse decision there. We reversed unanimously. The Board itself had not sought certiorari because "the Solicitor General concluded that other cases were entitled to priority in selecting the limited number of cases which the government [could] properly ask this Court to review." Memorandum for the NLRB, p. 2, filed in connection with the petition for certiorari, No. 89, October Term, 1963. Had the charged party been denied intervention in the Court of Appeals, the decision of the Government not to apply for certiorari—unrelated to the merits of the cause—would have unnecessarily postponed resolution on that important issue.[7]

Board, 305 U. S. 364, 370, that although "there are two proceedings, separately carried on the docket, they were essentially one so far as any question as to the legality of the Board's order was concerned."

[7] The Labor Board may also adversely affect the rights of the private parties in other instances. For example, the Board may

In fact, the Labor Board itself agrees that intervention by charged parties will not impair effective discharge of its duties and may well promote the public interest. The rights typically secured to an intervenor in a reviewing court—to participate in designating the record, to participate in prehearing conferences preparatory to simplification of the issues, to file a brief, to engage in oral argument, to petition for rehearing in the appellate court or to this Court for certiorari—are not productive of delay nor do they cause complications in the appellate courts. Appellate records in Labor Board cases are generally complete, and whatever material the charged party may see fit to add to the appendix will not affect the burden in preparation. Participation in defining the issues before the court guarantees that all relevant material is brought to its attention, and makes the briefs on the merits more meaningful. The charged party is usually accorded the right as an *amicus* to file a brief on the merits even if denied intervention. Participation in oral argument does not necessarily enlarge the total time allocated, since parties aligned on the same side are usually required to share the time.[8] And, as noted, petitioning for certiorari at this time has the salutary effect of insuring prompt adjudication. Further, if a charged party permitted to intervene decides to acquiesce in the

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decide a case and later re-evaluate its position at a time when that case is before an appellate court. The General Counsel, in such a situation, cannot be expected wholeheartedly to attempt to convince an appellate court of the correctness of a doctrine which the Board itself has abandoned.

[8] First Circuit Rule 28 (3); Second Circuit Rule 23 (c); Third Circuit Rule 31 (3); Fourth Circuit Rule 15 (3); Fifth Circuit Rule 25 (3); Sixth Circuit Rule 20 (3); Seventh Circuit Rule 21 (b); Eighth Circuit Rule 13 (c); Ninth Circuit Rule 20 (3); Tenth Circuit Rule 20 (3); District of Columbia Circuit Rule 19 (c).

Additionally, all the circuits have rules which permit the court to increase the time for oral argument upon a showing of good cause.

decision or if certiorari is denied by this Court, it is likely that he will then stipulate to the entry of an order against him. This would obviate the need for supplemental agency or court proceedings. On the other hand, an *amicus*—with the exception of the right to file a brief—might be unable adequately to present all the relevant data to the court.

Finally, an element of fortuity would be injected by the denial of intervention to a successful party in the Board proceedings. When the charged party loses before the Board, he is accorded a statutory right to immediate review and may seek or oppose this Court's ultimate review of the case. If he prevails at the agency level, however, denial of intervention deprives him of the rights accorded a losing party, even though the issue before the reviewing court is identical—whether a remedial order should have been entered against the charged party. These considerations lead us to the assumption that Congress would not intend, without clearly expressing a view to the contrary, that a party should suffer by his own success before the agency.

Additionally, helpful analogies may be found in the Judicial Review Act of 1950, governing intervention in the Courts of Appeals by private parties directly affected by agency orders,[9] and in the Federal Rules of Civil Procedure.[10] We take these provisions to mean that Congress has exhibited a concern that interested private parties be given a right to intervene and participate in the review proceedings involving the specified agency and its orders.

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[9] Review of commission orders in general is governed by the provisions of the Judicial Review Act of 1950 (the Hobbs Act), 64 Stat. 1129, 5 U. S. C. §§ 1031–1042 (1964 ed.). The provision regarding appellate court intervention, 5 U. S. C. § 1038, provides as follows: "The Attorney General shall be responsible for and have charge and control of the interests of the Government in all court proceedings authorized by this chapter. The agency, and any party or parties in interest in the proceeding before the agency whose interests will be affected if an order of the agency is or is not enjoined, set aside, or suspended, may appear as parties thereto of their own motion and as of right, and be represented by counsel in any proceeding to review such order. . . ."

II.

The problem of whether intervention should be granted to the successful charging party to the Labor Board proceedings presents considerations somewhat distinct from the case of the intervening charged party. Resolution of the problem is no easy matter, and it is understandable that the courts have divided on the issue.[11] Still, we believe that Congress intended intervention rights to obtain.

The Board opposes intervention in *Fafnir*. A charged party may incur a liability on account of an order being entered against him. Fairness to him thus requires that he be allowed to intervene to preclude that possibility. On the other hand, the Board reasons, the charging party stands only to become a beneficiary of an order entered.[12] As such, he is but another member of the public whose interests the Board is designed to serve. The Labor Board is said to be the custodian of the "public interest," to the exclusion of the so-called "private interests" at stake. Support for this view is claimed to be found in our decision in *Amalgamated Util. Workers* v. *Consolidated Edison Co.,* 309 U. S. 261 (1940). Also, the Board fears that enabling the intervenor to petition for certiorari from an adverse circuit decision will be inimical to the public interest. We disagree.

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[10] The Federal Rules of Civil Procedure, of course, apply only in the federal district courts. Still, the policies underlying intervention may be applicable in appellate courts. Under Rule 24 (a)(2) or Rule 24 (b)(2), we think the charged party would be entitled to intervene. See *Missouri-Kansas Pipe Line Co.* v. *United States,* 312 U. S. 502, 505–506; *Textile Workers Union of America* v. *Allendale Co.,* 96 U. S. App. D. C. 401, 403–404, 226 F. 2d 765, 767–768.

The Advisory Panel on Labor-Management Relations Law issued a report, S. Doc. No. 81, 86th Cong., 2d Sess. (1960), which contained a statement of policy that "any party to NLRB proceedings should be allowed to intervene in the appellate proceedings," p. 17.

[11] The cases which have permitted intervention usually have not discussed the question, *e. g., Labor Board* v. *Johnson,* 322 F. 2d 216 (C. A. 6th Cir.); *Kearney & Trecker Corp.* v. *Labor Board,* 210 F. 2d 852 (C. A. 7th Cir.), cert. denied, *sub nom. Kearney-Trecker Employees, UAW* v. *Labor Board,* 348 U. S. 824; *West Texas Utilities Co.* v. *Labor Board,* 184 F. 2d 233 (C. A. D. C. Cir.), cert. denied, 341 U. S. 939. Contra, *Labor Board* v. *Retail Clerks Assn.,* 243 F. 2d 777, 783 (C. A. 9th Cir.); *Stewart Die Casting Corp.* v. *Labor Board,* 132 F. 2d 801 (C. A. 7th Cir.); *Aluminum Ore Co.* v. *Labor Board,* 131 F. 2d 485, 488 (C. A. 7th Cir.).

In prior decisions, this Court has observed that the Labor Act recognizes the existence of private rights within the statutory scheme.[13] These cases have, to be sure, emphasized the "public interest" factor. To employ the rhetoric of "public interest," however, is not to imply that the public right excludes recognition of parochial private interests. A perusal of the statutory scheme and of the Board's Rules and Regulations is illustrative.

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[12] Cf. Hart and Wechsler, The Federal Courts and The Federal System, 326 (1953):

"Haven't you noticed how frequently the protected groups in an administrative program pay for their protection by a sacrifice of procedural and litigating rights? The agency becomes their champion and they stand or fall by it. Does this phenomenon reflect a disregard or a recognition of the equities of the situation?"

See also Jaffe, The Public Right Dogma in Labor Board Cases, 59 Harv. L. Rev. 720 (1946).

[13] *Labor Board* v. *Fansteel Metallurgical Corp.,* 306 U. S. 240, 258; *Phelps Dodge Corp.* v. *Labor Board,* 313 U. S. 177, 194; *Nathanson* v. *Labor Board,* 344 U. S. 25, 27; *Smith* v. *Evening News Assn.,* 371 U. S. 195. See Jaffe, The Individual Right to Initiate Administrative Process, 25 Iowa L. Rev. 485, 528–531 (1940).

The statutory machinery begins with the filing of an unfair labor practice charge by a private person, § 10 (b), 61 Stat. 146; see also, 24 Fed. Reg. 9102 (1959), 29 CFR § 102.9 (1965). When the General Counsel issues a complaint and the proceeding reaches the adjudicative stage, the course the hearing will take is in the agency's control, but the charging party is accorded formal recognition: he participates in the hearings as a "party"; [14] he may call witnesses and cross-examine others, may file exceptions to any order of the trial examiner, and may file a petition for reconsideration to a Board order, 28 Fed. Reg. 7973 (1963), as amended, 29 CFR § 102.46 (1965). Of course, if the Board dismisses the complaint, he can obtain review as a person aggrieved, which serves the "public interest" by guaranteeing that the Board interpretation of the relevant provisions accords with the intent of Congress.[15]

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[14] The NLRB Rules and Regulations and Statements of Procedure, 29 CFR § 102.8 (1965), afford the charging party this status. The section provides as follows:

"The term 'party' as used herein shall mean . . . any person named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any Board proceeding, including, without limitation, *any person filing a charge* or petition under the act, any person named as respondent, as employer, or as party to a contract in any proceeding under the act . . . ." (Emphasis added.)

[15] For an analysis of the rights of a charging party before the Board, see Comment, 32 U. Chi. L. Rev. 786 (1965). Of course, the considerations involved in determining whether the charging party has certain rights before the Board are not dispositive on the question of appellate intervention. In the first place, the need for centralized control over the agency hearings and the standards under which they operate is much greater at the administrative than the appellate level, where perforce an adequate record has been made for adjudication. Also, the statistics of the NLRB reveal that over 97% of the unfair labor practice charges are resolved before the circuit court has entered a decree. 29 NLRB Ann. Rep. 178–179,

And that the charging party may have vital "private rights" in the Board proceeding is clear in this very case, which also involves, potentially, a breach of the parties' collective bargaining agreement.[16] Under our decisions in the *Steelworkers* trilogy, 363 U. S. 564, 574, 593, and *Carey* v. *Westinghouse Corp.*, 375 U. S. 261, the Union could take whatever contractual claim it had to arbitration and from there to a federal court. And while it is true that the rights and duties under § 301 (a) of the Labor Act, 61 Stat. 156, are not coextensive with those redressed in Labor Board proceedings, a determination by an appellate court that the Union has no statutory right to conduct its own time studies will surely have an impact upon a later decision by an arbitrator or an appellate court under § 301 (a) on the contractual issue.

In short, we think that the statutory pattern of the Labor Act does not dichotomize "public" as opposed to "private" interests. Rather, the two interblend in the intricate statutory scheme.[17] Nor do we think that our holding in *Amalgamated Util. Workers,* 309 U. S. 261, casts doubt on these notions. The Court there held that private parties who initiated unfair labor practice charges may not prosecute a contempt action against the charged

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Table 7 (1964). This winnowing process diminishes once a case is lodged in the circuit court and falls within our supervisory power over the federal courts. Then, too, manpower and budgetary considerations are of great concern at the administrative level. These factors are not nearly as great when a labor dispute reaches the appellate courts since the Board will invariably appear to defend its order.

[16] In the Board's opinion in *Fafnir,* the charging party's interests were referred to a dozen times as a statutory right of the "private party," 146 N. L. R. B., at 1585-1587.

[17] See *Retail Clerks Local 137* v. *Food Employers Council, Inc.*, 351 F. 2d 525.

party in the court which enforces the Labor Board order.[18] In the same case, the private parties had been permitted to intervene in the Court of Appeals when the merits of the Board's decision were at stake, 309 U. S., at 263. We find nothing inconsistent in denying the right of a private party to institute a contempt proceeding—where the Board's expertness in achieving compliance with orders is challenged—and, on the other hand, in permitting intervention in a proceeding already in the court for decision. When the court is to rule on the merits of the Board's order, the Act supports the view that it is the court and not the agency which will define the public interest, see § 10 (d), 49 Stat. 454, *Ford Motor Co.* v. *Labor Board,* 305 U. S. 364.

The Board also argues that permitting intervention will adversely affect its tactical or budgetary decision not to bring a case here for review. But the opportunity is open to the Board to advise this Court whether a case that the intervening charging party brings here is an appropriate vehicle to raise important issues. And Congress has entrusted to this Court, rather than the Labor Board, discretionary jurisdiction to review cases decided by the Courts of Appeals.[19]

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[18] The Court placed great weight upon the language and legislative history behind § 10 (a), 49 Stat. 453, as it read at that time:

"The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. *This power shall be exclusive,* and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise." (Emphasis added.)

The italicized portion of § 10 (a) was deleted in the Taft-Hartley amendments to the Wagner Act in 1947, when Congress added the union unfair labor practice provisions and enacted § 301 (a). While it is true that the Labor Board does not confer a private administrative remedy, it is equally true that, since 1947, it serves substantially as an organ for adjudicating private disputes. See Report of the Advisory Panel on Labor-Management Relations Law, *supra,* n. 10, p. 5.

Many of the considerations which favor intervention in *Scofield* are also pertinent here.[20] Of special note is the capriciousness we would have to ascribe to Congress in refusing to afford the successful party to a Labor Board proceeding an opportunity tantamount to that of the unsuccessful party in persuading an appellate court. The charging party, like the charged party, should not be prejudiced by his success before the agency. Accordingly, we reverse both cases and remand them to the respective courts for further proceedings.

It is so ordered.

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[19] The Board also claims that the charging party, if permitted to intervene, will be able to thwart proposed settlements between the Board and the charged party when the case is in the appellate court. Nothing in the record indicates that this will be the consequence of allowing intervention and we intimate no view on the question.

[20] As in the case of the charged party, disallowing intervention could lead to duplicity in appellate review, "circuit shopping," unfairness to the successful party to the Board proceedings, etc.

UNITED GAS IMPROVEMENT CO. ET AL. *v.* CALLERY PROPERTIES, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 21. Argued October 18–19, 1965.—Decided December 7, 1965.*

Following this Court's decision in the *CATCO* case, 360 U. S. 378, and its vacation of a judgment upholding initial natural gas prices of 21.4¢ to 23.8¢ per Mcf. for numerous gas producers in southern Louisiana, the Federal Power Commission (FPC) instituted an area rate proceeding, from which the present applications were severed for a separate hearing. The producers were advised that they would have to refund amounts ultimately found inconsistent with the public interest and necessity requirements of § 7 of the Natural Gas Act. Following the hearing the FPC imposed conditions on the certificates granted, *viz.*, that (1) the producers start service at 18.5¢ per Mcf., plus 1.5¢ tax reimbursement where applicable—the "in-line" price for FPC-certificated gas sales for the contracts here involved, and (2) the producers should not, before establishment of just and reasonable area rates or July 1, 1967, whichever should be earlier, file rates above 23.55¢, the level at which the FPC found filings might trigger other producers' increased rates under contract escalation clauses with the pipelines here involved. The FPC also ordered refunded the excess of charges under the original certificate, over the proper initial prices. The Court of Appeals held on review that (1) the producers should not have been limited to an initial "in-line" gas price without the FPC's considering evidence of what would be a just and reasonable price; (2) the FPC lacked power to fix a producer's maximum future rates; and (3) the measure of the refunds should have been the difference between the original contract price and the ultimate just and reasonable price. *Held:*

1. The FPC had ample power under § 7 of the Natural Gas Act to protect the public interest by requiring as an interim

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*Together with No. 22, *Public Service Commission of New York* v. *Callery Properties, Inc., et al.*, No. 26, *Ocean Drilling & Exploration Co.* v. *Federal Power Commission et al.*, and No. 32, *Federal Power Commission* v. *Callery Properties, Inc., et al.*, also on certiorari to the same court.

measure that interstate gas prices be no higher than existing levels under other contemporaneous certificates, *i. e.*, the "in-line" prices, without considering the extensive evidence under which just and reasonable rates are fixed under § 5. Pp. 227–228.

2. It was a proper exercise of its administrative expertise for the FPC to fix the 23.55¢ rate limit, beyond which it found that a general price rise might be triggered by escalation during the interim period. Pp. 228–229.

3. In the exercise of its authorized power to order that refunds be paid as promptly as possible, the FPC could properly measure the refunds due by the difference between the original contract rates which it had erroneously sanctioned and the "in-line" rates; and the FPC was justified in imposing interest to prevent unjust enrichment. Pp. 229–230.

335 F. 2d 1004, reversed.

Richard A. Solomon argued the cause for the Federal Power Commission. With him on the brief were *Acting Solicitor General Spritzer, Howard E. Wahrenbrock, Robert L. Russell* and *Josephine H. Klein.*

William T. Coleman, Jr., argued the cause for United Gas Improvement Co. et al., petitioners in No. 21 and respondents in No. 26. With him on the briefs were *Samuel Graff Miller, Richardson Dilworth, Harold E. Kohn, Bertram D. Moll* and *Vincent P. McDevitt.*

Kent H. Brown argued the cause for Public Service Commission of New York, petitioner in No. 22 and respondent in No. 26. With him on the briefs was *Morton L. Simons.*

J. Evans Attwell argued the cause for Ocean Drilling & Exploration Co., petitioner in No. 26 and respondent in Nos. 21, 22 and 32. With him on the briefs were *W. H. Drushel, Jr., J. A. O'Connor, Jr.,* and *H. Y. Rowe.*

Herbert W. Varner argued the cause for Superior Oil Co. et al., respondents in Nos. 21, 22 and 32. With him on the brief was *H. H. Hillyer, Jr.*

Richard F. Generelly argued the cause and filed a brief for Callery Properties, Inc., respondent in Nos. 21, 22 and 32.

Paul W. Hicks argued the cause for Placid Oil Co. et al., respondents in Nos. 21, 22 and 26. With him on the brief were *Robert W. Henderson* and *Thomas G. Crouch.*

H. H. Hillyer, Jr., filed a brief for J. R. Frankel et al., respondents in Nos. 21, 22 and 32.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The Federal Power Commission in 1958–1959 granted unconditional certificates of public convenience and necessity to numerous producers of gas in south Louisiana, the sales contracts of the producers calling for initial prices ranging from 21.4 cents to 23.8 cents per Mcf. After deliveries commenced under those contracts, consumer interests challenged the orders in various courts of appeals. The Court of Appeals for the Third Circuit sustained the Commission's action (*United Gas Improvement Co.* v. *Federal Power Comm'n,* 269 F. 2d 865) but we vacated the judgment (*Public Service Comm'n* v. *Federal Power Comm'n,* 361 U. S. 195) for reconsideration in light of *Atlantic Refining Co.* v. *Public Service Comm'n (CATCO),* 360 U. S. 378; and the other courts of appeals did likewise.[1]

The Commission thereupon instituted an area rate proceeding for south Louisiana and consolidated the remanded cases with that proceeding. 25 F. P. C. 942. It advised the producers of their potential obligation to refund any amounts eventually found to be inconsistent "with the requirements of the public interest and necessity" under § 7 of the Natural Gas Act, 52 Stat. 824, as amended, 15 U. S. C. § 717f. 27 F. P. C. 15. Later the Commission in the interest of expedition severed the present group of applications and set them for a hearing in a consolidated proceeding under § 7. 27 F. P. C. 482. At the end, the Commission imposed two conditions on the certificates granted in these cases. *First,* it provided that the producers commence service at 18.5 cents per Mcf., plus 1.5 cents tax reimbursement where applicable, a price that it found to be "in line" with prices for Commission-certificated sales of gas from the southern Louisiana production area under generally contemporaneous contracts, 30 F. P. C. 283, 288–289. *Second,* it provided that until just and reasonable area rates are determined for south Louisiana, or until July 1, 1967, whichever is earlier, the producers shall not file any increased rates above 23.55 cents, the level at which rate filings might trigger increased rates by other producers under the escalation provisions of their contracts with the pipeline companies here involved. 30 F. P. C. 283, 298.

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[1] See *United Gas Improvement Co.* v. *Federal Power Comm'n,* 283 F. 2d 817; *Public Service Comm'n* v. *Federal Power Comm'n,* 109 U. S. App. D. C. 292, 287 F. 2d 146; *United Gas Improvement Co.* v. *Federal Power Comm'n,* 287 F. 2d 159; *United Gas Improvement Co.* v. *Federal Power Comm'n,* 290 F. 2d 133; and *United Gas Improvement Co.* v. *Federal Power Comm'n,* 290 F. 2d 147.

In addition, the Commission ordered the producers to refund to their customers the amounts in excess of the proper initial price which they had already collected under the original certificate. 30 F. P. C. 283, 290.

On review the Court of Appeals held that the Commission erred in limiting producers to an initial "in-line" price without first canvassing evidence bearing on the question of what would be a just and reasonable price for the gas. It further held that the Commission had no power to place an upper limit on future rates that a producer might file. Finally, the Court of Appeals, while upholding the power of the Commission to order refunds, held that the measure of such refunds was not to be the difference between the "in-line" price and the original contract price, but between the latter and the just and reasonable price subsequently to be fixed. 335 F. 2d 1004. We granted certiorari, 380 U. S. 931. We reverse the Court of Appeals.

We think the Commission acted lawfully and responsibly in line with our decision in the *CATCO* case where we held that it need not permit gas to be sold in the interstate market at the producer's contract price, pending determination of just and reasonable rates under § 5, 52 Stat. 823, 15 U. S. C. § 717d. 360 U. S. 378, 388–391. Rather, we held that there is ample power under § 7 (e),[2] to attach appropriate protective conditions. And see *Federal Power Comm'n* v. *Hunt,* 376 U. S. 515, 524–527. The fixing of an initial "in-line" price establishes a firm price at which a producer may operate, pending determination of a just and reasonable rate, without any contingent obligation to make refunds should a just and reasonable rate turn out to be lower than the "in-line" price. Consumer protection is afforded by keeping the "in-line" price at the level where substantial amounts of gas have been certificated to enter the market under other contemporaneous certificates, no longer subject to judicial review or in any way "suspect." We believe the Commission can properly conclude under § 7 that adequate protection to the public interest requires as an interim measure that gas not enter the interstate market at prices higher than existing levels. To consider in this § 7 proceeding the mass of evidence relevant to the fixing of just and reasonable rates under § 5 might in practical effect render nugatory any effort to fix initial prices.[3] We said in *CATCO* that § 7 procedures are designed "to hold the line awaiting adjudication of a just and reasonable rate" (360 U. S., at 392), and that "the inordinate delay" in § 5 proceedings (360 U. S., at 391) should not cripple them.

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[2] Section 7 (e) provides in part:

"The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require."

The second condition, which temporarily bars rate increases beyond 23.55 cents per Mcf., was likewise aimed at keeping the general price level relatively constant pending determination of the just and reasonable rate. We noted in *Federal Power Comm'n* v. *Hunt, supra,* at 524, that "a triggering of price rises often results from the out-of-line initial pricing of certificated gas" and that the possibility of refund does not afford sufficient protection. And see *Federal Power Comm'n* v. *Texaco Inc.,* 377 U. S. 33, 42–43. We think, contrary to the Court of Appeals, that there was ample power under § 7 (e) for the Commission to attach these conditions for consumer protection during this interim period though the certificate was not a temporary one, as in *Hunt,* but a permanent one, as in *CATCO* and *Federal Power Comm'n* v. *Texaco Inc., supra.*

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[3] In the early post-*CATCO* cases, the Commission apparently proceeded on a case-by-case basis, considering whatever evidence might have been presented. See, *e. g., Continental Oil Co.,* 27 F. P. C. 96, 102–108. Experience convinced it that the minimal utility derived from cost and economic trend evidence was outweighed by the administrative burdens and delays its consideration inevitably produced. See *Skelly Oil Co.,* 28 F. P. C. 401, 410–412. The Commission properly and constructively exercised its discretion in declining to consider this large quantity of evidence. To have done so would have required a considerable expenditure of manpower, cf. *Wisconsin* v. *Federal Power Comm'n,* 373 U. S. 294, 313. We have previously encouraged the Commission to devise reasonable means of streamlining its procedures, see *Federal Power Comm'n* v. *Hunt, supra,* at 527, and we regard the Commission's decision here as an appropriate step in that direction. Cf. *Federal Power Comm'n* v. *Texaco Inc.,* 377 U. S. 33, 44.

The "in-line" price of 18.5 cents is supported by the contract prices in the south Louisiana area that were not "suspect," and the selection of 23.55 cents beyond which a price increase might trigger escalation reflects the Commission's *expertise.*

We also conclude that the Commission's refund order was allowable. We reject, as did the Court of Appeals below, the suggestion that the Commission lacked authority to order any refund. While the Commission "has no power to make reparation orders," *Federal Power Comm'n* v. *Hope Natural Gas Co.,* 320 U. S. 591, 618, its power to fix rates under § 5 being prospective only, *Atlantic Refining Co* v. *Public Service Comm'n, supra,* at 389, it is not so restricted where its order, which never became final, has been overturned by a reviewing court. Here the original certificate orders were subject to judicial review; and judicial review at times results in the return of benefits received under the upset administrative order. See *Securities & Exchange Comm'n* v. *Chenery Corp.,* 332 U. S. 194, 200–201. An agency, like a court, can undo what is wrongfully done by virtue of its order. Under these circumstances, the Commission could properly conclude that the public interest required the producers to make refunds[4] for the period in which they sold their gas at prices exceeding those properly determined to be in the public interest.

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[4] The problem of refunds for amounts collected above the "in-line" price is not affected here by any filing under § 4 for increases within the limits of the triggering moratorium. 52 Stat. 822, 15 U. S. C. § 717c. Under § 4 (d), a 30-day notice to the Commission and to the public is required for all rate increases, the Commission having authority under § 4 (e) to suspend the new rate for five months and thereafter to act only "after full hearings." If the Commission has not acted at the expiration of the period of suspension, the new rates become effective. The Commission may require the producer to furnish a bond, and thereafter may compel refund of "the portion of such increased rates or charges by its decision found not justified."

We think that the Commission could properly measure the refund by the difference between the rates charged and the "in-line" rates to which the original certificates should have been conditioned. The Court of Appeals would delay the payment of the refund until the "just and reasonable" rate could be determined. We have said elsewhere that it is the duty of the Commission, "where refunds are found due, to direct their payment at the earliest possible moment consistent with due process." *Federal Power Comm'n* v. *Tennessee Gas Transmission Co.,* 371 U. S. 145, 155. These excessive rates have been collected since 1958; under the circumstances, the Commission was not required to delay this refund further. And the imposition of interest on refunds is not an inappropriate means of preventing unjust enrichment. See *Texaco, Inc.* v. *Federal Power Comm'n,* 290 F. 2d 149, 157; *Philip Carey Mfg. Co.* v. *Labor Board,* 331 F. 2d 720, 729–731.

Reversed.

MR. JUSTICE FORTAS took no part in the consideration or decision of these cases.

MR. JUSTICE HARLAN, concurring in part and dissenting in part.

While the Commission's expansive view of its powers seems to me largely defensible in the abstract, I believe its actual decision reveals error and unfairness in important respects.

I.

The price condition, alone of the three key prongs of the Commission's order, can in my view be wholly sustained. The chief challenge to it stems from the exclusion in the § 7 hearing of a mass of cost and supply-demand evidence tendered by producers.[1] Although the encompassing § 7 standard of public convenience and necessity encourages a broad inquiry, the Commission has given valid reasons for limiting itself to the in-line price for the time being. Area pricing ultimately aims to simplify proceedings under the statute, but the transition to it is said to strain the Commission's present resources for investigation. See *Wisconsin* v. *FPC,* 373 U. S. 294, 298–300, 313–314. The in-line price, comparatively easy to fix, provides a firm basis for producers, helps avoid unrefundable initial overcharges, and exerts a downward pressure on price; at the same time, producers can file increases under § 4 with a six-month delay at most. The Commission has given a fair trial to cost evidence,[2] and nothing in the offer of proof suggests a supply-demand crisis warranting court intervention with this administrative approach.

In locating the in-line price, the Commission has ignored a number of contemporaneous high-price contracts labeled "suspect" because then under review, disapproved, or deemed influenced by those under review or disapproved. Although the danger of using a crooked measuring rod demands some precaution, this blanket exclusion also chances some distortion in favor of an unduly low in-line price. In the main the producers have chosen not to brief this question, apparently under the misapprehension that the Government has not here sought to sustain the exclusion of these contracts or that the lower court's failure to reach the question precluded this Court from doing so.[3] But while the suspect order rule may by default be abided in this instance, I would not close the door to future arguments for a different solution of the dilemma.

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[1] Section citations herein are all to the Natural Gas Act, 52 Stat. 821, as amended, 15 U. S. C. §§ 717–717w (1964 ed.).

[2] See the majority's note 3, *ante*, p. 228.

[3] See Petition of the FPC for Certiorari, p. 15, n. 14.

A last troubling aspect of the in-line price derives from a critical and unusual circumstance: it, like the other conditions in this case, was imposed for the first time on remand, several years after an unconditioned permanent certificate had issued. Presumably for six months hence, producers will be compelled to sell at a price they might not have accepted when free to refuse; for all that appears, the price may even be below cost, let alone a fair profit. However, in general the producers apparently did not seek an option to cancel future sales if dissatisfied by the newly conditioned certificates, the six-month delay is both brief and familiar, and I cannot say the Commission did not have a legitimate interest in imposing the in-line price at the time it did.

II.

The price-increase moratorium also seems to me a measure not generally beyond the Commission's grasp, but it should not be sustained on the record before us. Recognizing force in the contrary view of the Court of Appeals, I do not believe that § 4 must be read to bestow on producers an invincible right to raise prices subject only to a six-month delay and refund liability. Cf. *FPC* v. *Texaco Inc.*, 377 U. S. 33; *FPC* v. *Hunt*, 376 U. S. 515. A freeze until 1967 is not permanent price-fixing, and in this interregnum between individual and area pricing, the hazard of irreversible price increases warrants imposing some brake. A lengthy moratorium—coupled with a refusal to consider cost or supply-demand figures in setting prices for the duration—might present a real risk of choking off supply, but such a case is not before us.

Nevertheless, a moratorium instituted on remand is a hazardous device at best, and the present one is simply not supported by evidence. Because the producers have no chance to refuse the certificates after commencing delivery, the ceiling may coerce sales at unfairly low prices. Yet while the present moratorium must be endured longer than the in-line price, at least it permits the producers to charge a markedly higher amount; and as the safety valve for a price explosion, the moratorium could be upheld. At this point, however, the Government's argument fails for lack of proof that a price explosion is likely if increases rise above the moratorium figure. The Commission's figure was not considered by its hearing examiner, who made no recommendation for a moratorium. The Commission report itself devotes no more than one conclusory sentence, qualified by a footnote, to the question of what specific price rise will trigger increases at large, 30 F. P. C., at 298; rather than amplifying, the Government brief merely contends that the point has not been adequately preserved under § 19—a contention I do not accept.[4] Several producers state that the Commission's fear of triggering has not been realized although sales are currently being made by them at levels above the intended moratorium price.

III.

While agreeing that the Commission has power to order refunds in the case before us, I believe the measure of repayment it selected is illogical and harsh. On the initial question of power, it must be conceded that nothing in the statute provides for refunds when a sale has been approved without qualification; but approval in the present instances had not become final for want of judicial review, and an equitable power to order refunds may fairly be implied.

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[4] This precise ground of attack upon the moratorium was set forth by at least one producer. See ODECO Application for Rehearing Before the FPC. R. 603. Applications of other producers argued instead that any moratorium was plainly illegal under the Fifth Circuit's decision in *Hunt* v. *FPC,* 306 F. 2d 334, which had not then been reversed by this Court. 376 U. S. 515. See Petition of Placid Oil et al. for Rehearing Before the FPC, p. 35. Under these circumstances, § 19 does not seem to me to preclude allowing all producers the benefit of the error pinpointed by ODECO.

The measure of refunds is another matter. The Commission has now directed that the producers repay the difference between the amounts collected over four to six years and the figure it has now established as the original in-line price.[5] Since the in-line price has been fixed without reference to cost evidence and falls below the opening levels set in the negotiated contracts, the producers may well be receiving less than cost, as some of them expressly claim; and this imposed revision downward of prices covers not six months but a period of years.

The obvious refund formula, implicated by the statute itself and adopted by the Court of Appeals, would call for repayment of all amounts collected in excess of the "just and reasonable" price; that price, measured under §§ 4 and 5, naturally takes due account of costs. The Government retorts that producers have no "right" to sell their gas for a "just and reasonable" price under the statute, a proposition perhaps true in the limited sense that the public convenience and necessity might yet exclude fair-profit sales by a uniquely high cost producer or in the face of a glutted market. No attempt is made, however, to class the present facts with such imaginable situations. Nor is advance exclusion from the interstate market so fearsome as an unexpected repricing of a completed sale depriving the seller of profit or costs.

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[5] Deliveries commenced under all or nearly all the contracts in 1959 at prices exceeding 18.5 cents. The Commission's order directing the in-line price, refunds, and the moratorium issued four years later in 1963, and it has been under judicial review for the past two years. The record does not clearly indicate what rate increases the producers may already have filed with the Commission.

On the present facts the Government has failed to point to any public interest overriding the potent claims of the producers to a fair return on their past four to six years of sales. Any triggering caused by the amounts previously charged has already spent its force and cannot be undone. Unconvincingly, the Government implies the producers may be comparatively well off with the present formula because it provides a final figure now and the "just and reasonable" price might prove to be below the in-line price; however, instant certainty as to past prices is no great gain since taxes and royalties have already been paid, and the chance that producers may get more than they deserve by following the in-line price is not a substitute for assuring them a fair return. About the only concrete advantage cited by the Government for the in-line price is that it speeds refunds to consumers. Assuming that a compromise cannot be reached as in other cases,[6] elaborate cost data should become available in the next year or two with the completion of the southern Louisiana area rate proceeding. Consumers, who assuredly expected no refunds when they paid their gas bills as long ago as six years, certainly do not suffer seriously in waiting a bit longer for refunds that individually must be minute in most cases.

The incongruity of the Commission's refund formula is well portrayed by considering what would have happened if the Commission had originally granted the certificates now thought proper by this Court. By accepting certificates conditioning sales at the in-line price, the producers could immediately have filed for increases, suffering at most a six-month delay. Even if the Commission's moratorium survived, the ceiling during this four-to-six-year period would have been 23.55 cents rather than the 18.5-cent figure now imposed. Thus, even had the Commission not erred in the first instance in favor of the producers, they still could have collected payments well in excess of 18.5 cents subject only to the ultimate finding of a "just and reasonable" price now denied them by the Commission.

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[6] On several occasions, the Commission has approved agreements by producers to refund a fixed fraction of the difference between the amounts collected and the settlement price. See *Texaco Inc.*, 28 F. P. C. 247 (other producers severed from the instant case); *Continental Oil Co.*, 28 F. P. C. 1090 (on remand from *CATCO*).

In line with the foregoing discussion, I would uphold the Commission's decision fixing an in-line price, remand the case for further findings on the triggering price for a moratorium if the Commission wishes to pursue the point, and set aside the refund with leave to order repayments based on the "just and reasonable" price.

WESTERN PACIFIC RAILROAD CO. ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA.

No. 12. Argued October 19, 1965.—Decided December 7, 1965.

Section 3 (4) of the Interstate Commerce Act prohibits carriers from discriminating in their rates between "connecting lines." Appellant Western Pacific Railroad filed a complaint with the Interstate Commerce Commission alleging that certain carriers discriminated against it by refusing to enter into joint through rates via Portland, Oregon, with a multi-railroad route of which Western Pacific is the central portion, although they maintain such joint through rates with a competitor. Division 2 of the Commission refused to accord Western Pacific "connecting line" status on the ground that it did not connect physically with the allegedly discriminating carriers and did not participate in existing through routes with them through the point of discrimination. The Commission denied further hearing and a three-judge federal court dismissed the complaint on the basis that Western Pacific was not a "connecting line." *Held:*

1. The term "connecting lines" does not require a direct physical connection, but refers to all lines making up a through route. *Atlantic Coast Line R. Co.* v. *United States,* 284 U. S. 288, followed. Pp. 242–243.

2. To qualify as a "connecting line" in the absence of physical connection, a carrier need only show that it participates in an established through route, making connection at the point of common interchange, all of whose participants stand ready to cooperate in the arrangements needed to remove the alleged discrimination. P. 245.

230 F. Supp. 852, vacated and remanded.

Paul Bender, pro hac vice, by special leave of Court, and *Walter G. Treanor* argued the cause for appellants. With *Mr. Bender* on the brief for the United States were *Acting Solicitor General Spritzer, Assistant Attorney General Turner, Lionel Kestenbaum, Jerry Z. Pruzansky* and *John H. Dougherty*. With *Mr. Treanor* on the briefs for Western Pacific Railroad Co. et al. were *E. L. Van Dellen* and *E. Barrett Prettyman, Jr.*

Robert W. Ginnane argued the cause for appellee Interstate Commerce Commission. With him on the brief was *Robert S. Burk*. *Frank S. Farrell* argued the cause for appellees Northern Pacific Railway Co. et al. With him on the brief were *William P. Higgins, Charles W. Burkett* and *Earl F. Requa*.

MR. JUSTICE STEWART delivered the opinion of the Court.

Section 3 (4) of the Interstate Commerce Act, as amended, 54 Stat. 902, 49 U. S. C. § 3 (4) (1964 ed.), commands that "All carriers subject to the provisions of this chapter . . . shall not discriminate in their rates, fares, and charges between connecting lines . . . ."[1] The meaning of the term "connecting lines" is the crucial question in this controversy between the Western Pacific Railroad Company, on the one hand, and the Union Pacific Railroad Company and the Northern Pacific Railway Company, on the other. Western Pacific contends that it is a "connecting line" in relation to these carriers and that, therefore, it is entitled to invoke against them the provisions of § 3 (4) prohibiting discriminatory rates. The Interstate Commerce Commission and the District Court held otherwise.

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[1] Section 3 (4) provides in full:

"All carriers subject to the provisions of this chapter shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this chapter or any common carrier by water subject to chapter 12 of this title."

Western Pacific filed a complaint with the Commission, alleging, in part, that Union Pacific and Northern Pacific practice rate discrimination against it.[2] The alleged discrimination consists in the refusal of these carriers, except with respect to a few commodities, to enter into joint through rates via Portland, Oregon, with the route of which Western Pacific is part, although they maintain a full line of such rates with a competitor, the Southern Pacific Company. The hearing examiner found in favor of Western Pacific, but Division 2 of the Commission reversed. The Division found both that Western Pacific could not invoke the provisions of § 3 (4) because it was not a "connecting line," and that, even if it were, the evidence did not establish the "similarity of circumstances and conditions" that would compel rate treatment equal to that accorded to Southern Pacific.

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[2] Western Pacific and its subsidiaries named as defendants: The Northern Pacific Railway Company, The Union Pacific Railroad Company, and certain of their short-line connections. These railroads denied the allegations of the complaint. The Southern Pacific Company intervened in opposition to the complaint. The complaint also named as defendants: The Atchison, Topeka & Santa Fe Railway Company, The Great Northern Railway Company, and certain short-line connections. These railroads answered expressing willingness to join in the relief sought by Western Pacific.

The complaint also alleged violation of § 1 (4) of the Act which requires, in part, that railroads establish "reasonable through routes" with other carriers and "just and reasonable rates, fares, charges, and classifications applicable thereto . . . ." When such routes are not established voluntarily, the Commission has authority under § 15 (3), to prescribe them "in the public interest." This authority is subject to the short-haul limitation embodied in § 15 (4). Although the complainants indicated a willingness to rely solely on the alleged violation of § 3 (4), the Commission found against them on the § 1 (4) allegation as well. No question under § 1 (4) is presented here.

The Division refused to accord Western Pacific "connecting line" status on the ground that it neither physically connects with the allegedly discriminating carriers at the point of discrimination, nor participates in existing through routes with them through that point. *Western Pacific R. Co.* v. *Camas Prairie R. Co.,* 316 I. C. C. 795. When the full Commission denied further hearing, Western Pacific brought this action in the United States District Court for the Northern District of California to set aside the Commission's order. The three-judge court dismissed the complaint solely on the ground that Western Pacific was not a "connecting line." *Western Pacific R. Co.* v. *United States,* 230 F. Supp. 852. It agreed with the Commission's limited definition of the term and said, "Any further liberalization of the present definition will have to come from the Supreme Court." *Id.,* at 855. We noted probable jurisdiction. 379 U. S. 956.

Analysis of "connecting line" status in this case is closely tied to the geographical, structural, and economic relationships among the railroads involved. Union Pacific, Northern Pacific and their short-line connections provide exclusive rail service between many points in the Pacific Northwest and Portland, Oregon. From Portland, the two competitive routes in question descend, at times parallel, at times intertwined, to Southern California. The route closest to the seacoast consists largely of Southern Pacific. To the east of this route lies the so-called Bieber route whose completion in 1931 was authorized by the Commission to provide competition with Southern Pacific.[3] The Bieber route is composed of the end-to-end connections of three different companies: the Great Northern Railway from Portland to

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[3] *Great Northern R. Co. Construction,* 166 I. C. C. 3, 39; 170 I. C. C. 399.

Bieber, California; the Western Pacific from Bieber to Stockton; and the Atchison, Topeka & Santa Fe from Stockton to Southern California. Thus the Bieber route and Southern Pacific both connect with the allegedly discriminating carriers at Portland where facilities for the interchange of traffic exist.

The Bieber route carriers presently enjoy joint through rates among themselves. Moreover, the other two participants in that route have expressed willingness to join with Western Pacific in the joint rates it seeks with Union Pacific and Northern Pacific. Union Pacific and Northern Pacific, for over 50 years, have maintained through routes and a full line of joint rates with Southern Pacific via Portland. They have refused, however, except for a few commodities, to offer through routes and joint rates on traffic moving on the Bieber route through Portland. The joint rates established with Southern Pacific are lower than the combination of local rates that would otherwise apply. Since the Bieber route carriers can offer joint rates only with respect to a few commodities, they cannot match the lower rates offered by Southern Pacific to shippers of most commodities between points in California and points in the Pacific Northwest exclusively served by Union Pacific and Northern Pacific via Portland.

The Commission and the District Court held, however, that even under these circumstances, Western Pacific is not a "connecting line" eligible to complain of the alleged discrimination. In argument here the Commission and the appellee railroads contend that to qualify for that status Western Pacific must show more than that it participates in an established through route that connects with Union Pacific and Northern Pacific, and that all the participants in the route stand willing to cooperate with these carriers in establishing joint through rates.[4] We are urged to hold that to qualify under § 3 (4) as a complainant "connecting line" a railroad must either itself make a direct connection with the discriminating carrier, or be part of a through route that already includes the carrier. We cannot accept such a construction of the statute.

The literal meaning of the statute does not require that construction. To be sure, the term, "connecting lines" suggests the requirement of an actual physical connection between the complainant and the discriminating carrier. The term "line," however, admits of more than a single meaning limited to the track owned exclusively by one railroad company. It may also be interpreted reasonably to include a functional railroad unit such as the Bieber through route involved here. Moreover, all parties in this litigation recognize that in *Atlantic Coast Line R. Co.* v. *United States,* 284 U. S. 288, this Court rejected the contention that "connecting line" is a term limited to the meaning that the statutory language might initially suggest. Mr. Justice Brandeis, speaking for a unanimous Court, wrote, "There is no warrant for limiting the meaning of 'connecting lines' to those having a direct physical connection . . . . The term is commonly used as referring to all the lines making up a through route." *Id.,* at 293.

There also is no warrant for limiting the meaning of "connecting lines" to the lines making up a through route that already includes the discriminating carrier. We have been referred to no previous judicial or administrative decisions compelling that conclusion. The *Atlantic Coast Line* case, *supra,* imposes no such limitation. It established that the term "connecting lines" extends beyond physical connection to encompass lines participating in a through route, but it does not even hint of any limitation on the nature of the through route, much less hold that the through route must already include the discriminating carrier.[5] Our subsequent definition of "through route" in *Thompson* v. *United States*, 343 U. S. 549, adds no more to an analysis of "connecting line" under § 3 (4). In that case, which arose under §§ 15 (3) and 15 (4) of the Act, we held that the Commission had improperly applied the test of the existence of a through route: ". . . whether the participating carriers hold themselves out as offering through transportation service." 343 U. S., at 557. Section 3 (4) does not use the term "through route." But even if, after *Atlantic Coast Line,* a carrier may qualify as a "connecting line" if it is one of the "lines making up a through route,"

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[4] Pursuant to 28 U. S. C. § 2322 (1964 ed.), the United States was named as defendant in the District Court. It did not, however, join with the Commission in defense of the Commission's order, and it supports Western Pacific in this Court.

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[5] In the *Atlantic Coast Line* case, certain railroads leasing the Carolina, Clinchfield & Ohio Railway with the approval of the Commission filed restrictive schedules designed ultimately to exclude an as yet incomplete extension of the Georgia & Florida Railroad from participating, when completed, in joint rates over the Clinchfield. The Commission ordered the schedules canceled on the ground that they violated terms in the lease, accepted by the lessees, on which the Commission had conditioned its approval. One condition required the lessees to permit the Clinchfield to be used as a link for through traffic with "such other carriers, now connecting, or which may hereafter connect, with [it] . . . ." 284 U. S., at 292, note 3. The extension of the Georgia & Florida made connection with the Clinchfield only via the rails of an intermediate carrier. This Court sustained the Commission's order, however, and held that the Georgia & Florida was a carrier connecting with the Clinchfield because it was one of the "lines making up a through route." 284 U. S., at 293. Even assuming that the through route referred to was not one limited to the complaining carrier and the intermediate carrier, it is clear that this Court was not faced with the question whether the complaining railroad would be regarded as a "connecting line" if the through route establishing the connection did not also encompass the Clinchfield. In short, *Atlantic Coast Line* did not present the issue squarely before us now.

284 U. S., at 293, the *Thompson* test offers no solution to the problem presented here. It simply does not speak to the question whether the discriminating carrier must be one of the participating carriers offering through service in conjunction with the carrier seeking "connecting line" status.

The reason the issue presented in this case has not been decided before now[6] may be that discrimination of the sort complained of here is uncommon. In most instances it is to the advantage of railroads such as Union Pacific and Northern Pacific to encourage the movement of traffic over their lines from as many sources as possible.[7] Moreover, when such discrimination does occur the railroad connecting directly with the discriminating carrier is likely to take the lead as complainant.

In the absence of any settled construction of § 3 (4), then, its manifest purpose to deprive railroads of discretion to apportion economic advantage among competitors at a common interchange must be the basic guide to decision. Just such discretion would be conferred upon railroads in a position to discriminate if we were to hold that their decisions not to enter through route relationships with connecting through routes could bar nonadjacent participants in such through routes from eligibility to complain. Indeed such a holding would result in an anomalous set of circumstances clearly illustrated in the present context. No one doubts that Southern Pacific, by virtue of its direct physical con-

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[6] Although we do not regard *Chicago, Indianapolis & Louisville R. Co.* v. *United States*, 270 U. S. 287, as dispositive of the question presented, that case, on its facts, supports the conclusion we reach.

[7] In response to an inquiry at oral argument, the parties have submitted memoranda agreeing that through routes and joint rates are ordinarily established by voluntary agreement, and that a railroad usually interchanges traffic on a comparable basis with competing railroads at a common interchange. See also *Thompson* v. *United States*, 343 U. S. 549, 554.

nection, would be eligible to complain of rate discrimination if it were practiced in favor of the Bieber route. It is also undisputed that Great Northern would be eligible to complain of the present discrimination, not merely as it affects its segment of the Bieber route, but on behalf of the route as a whole. Moreover, it is clear that if Union Pacific and Northern Pacific had entered a through route relationship with the Bieber route and then had decided to abandon it, or to set rates somewhat higher than those set for Southern Pacific, any participant in the Bieber route could complain of that discrimination. We cannot therefore construe § 3 (4) to bar these participants from eligibility to complain solely because they have been put to an even greater competitive disadvantage by the refusal of the allegedly discriminating carriers to enter a through route relationship with them comparable to the one established with Southern Pacific. Hence, we hold that to qualify as a "connecting line," in the absence of physical connection, a carrier need only show that it participates in an established through route, making connection at the point of common interchange, all of whose participants stand willing to cooperate in the arrangements necessary to eliminate the alleged discrimination.

Such a construction of "connecting line" does not interfere with the function of the Commission under § 15 (3) of the Act, 54 Stat. 911, 49 U. S. C. § 15 (3) (1964 ed.), to require the establishment of through routes and joint rates "in the public interest."[8] Section 3 (4) is applicable only to a narrower range of situations involving discrimination at a common interchange. Moreover, the remedy in § 3 (4) situations need not entail the establishment of through routes, joint rates, or indeed any particular form of relief. All that is required is the elimination of discriminatory treatment. See *Chicago, Indianapolis & Louisville R. Co.* v. *United States,* 270 U. S. 287, 292–293; *United States* v. *Illinois Central R. Co.,* 263 U. S. 515, 520–521. Finally, our holding does no more than to define the characteristics of a carrier eligible to complain. Relief is warranted only if it also appears that differential treatment is not justified by differences in operating conditions that substantially affect the allegedly discriminating carrier. See *United States* v. *Illinois Central R. Co., supra,* at p. 521; *Atchison, Topeka & Santa Fe R. Co.* v. *United States,* 218 F. Supp. 359, 369.

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[8] Section 15 (3) provides in relevant part:

"The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this chapter . . . or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated."

In the present case, having found that Western Pacific was not eligible to complain, the District Court did not reach the question whether it was entitled to relief. We therefore vacate the judgment and remand this case to the District Court for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE DOUGLAS, dissenting.

Under the Interstate Commerce Act, 49 U. S. C. § 1 *et seq.,* as I read it, there are two ways of obtaining "through routes." One is to qualify as a "connecting line" within the meaning of § 3 (4) where a similarly situated competing carrier has been given a through route.[1]

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[1] Section 3 (4) provides:

"All carriers subject to the provisions of this chapter shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and *connecting lines,* and for the receiving, forwarding, and delivering

The other is to apply for a rate for a "through route" under § 1 (4).[2] In the event that a carrier refuses to establish a "through route," the Commission may "upon complaint or upon its own initiative without complaint," establish a "through route" when "deemed by it to be necessary or desirable in the public interest." § 15 (3).[3]

In this case appellants sought a "through route" with certain appellee railroads on the same basis as the joint rates those railroads had established with the Southern

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of passengers or property to and from *connecting lines;* and shall not discriminate in their rates, fares, and charges between *connecting lines,* or unduly prejudice *any connecting line* in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this chapter or any common carrier by water subject to chapter 12 of this title." (Italics added.)

The discriminatory refusal to enter into through routes has been held to constitute a violation of § 3 (4). See *Dixie Carriers, Inc.* v. *United States,* 351 U. S. 56.

[2] Section 1 (4) provides in part:

"It shall be the duty of every common carrier subject to this chapter to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; . . ."

[3] Section 15 (3) provides in part:

"The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this chapter, or by carriers by railroad subject to this chapter and common carriers by water subject to chapter 12 of this title, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated."

Pacific. In an adversary proceeding the Commission denied the establishment of a "through route" under § 1 (4) saying:

> ". . . The shippers urge that the rates and routes sought would give them more freedom of choice in the movement of their goods, would improve transportation service, time in transit, and car supply, and make available additional transit privileges. Nothing of record, however, indicates that the existing through routes and joint rates are inadequate to meet the needs of the shipping public. In fact the failure of the shipper witnesses to initiate in the last 31 years a determined campaign to persuade the defendants of the necessity of establishing through routes between points on the complainants' lines in California and points on the defendants' lines in the Northwest, is at least some indication of the adequacy of the existing routes. The expression 'in the public interest' means more than a mere desire on the part of shippers for something that would merely be convenient or desirable for them. This desire must be weighed against the effect on other carriers and the general public. On the basis of this record, we cannot find that the public interest would be served by requiring the establishment of joint rates and through routes which are substantially slower and costlier than the present routes." 316 I. C. C. 795, 810–811.

What the Court does today is to let § 3 (4) swallow § 1 (4) by letting any segment of a multi-carrier through route become a "connecting line."[4] For then the ban in § 3 (4) on discriminatory rates *in effect* forces the establishment of "through routes" with "just and reasonable rates" as required by § 1 (4), without satisfying any of the conditions of § 1 (4) and of § 15 (3). Indeed after today, the whole protective scheme of § 15 (3) which makes the Commission the guardian of "through routes" (see *St. Louis R. Co.* v. *United States,* 245 U. S. 136, 142–143) breaks down.

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[4] The term "multi-carrier through route" is used here to indicate a route composed of two or more carriers which have established among themselves a through route with joint rates. This, of

In addition to the conditions set forth in § 15 (3) the Commission's power to compel the establishment of through routes is limited by § 15 (4), which prevents the Commission from establishing any through route requiring a carrier to "short haul" itself except where particular circumstances (enumerated in § 15 (4)) are found to exist. See *Thompson* v. *United States,* 343 U. S. 549, 552–556; *Denver & R. G. W. R. Co.* v. *Union P. R. Co.,* 351 U. S. 321, 325 *et seq.; Chicago, M., St. P. & P. R. Co.* v. *United States,* 366 U. S. 745. Can a carrier after today's decision be compelled to "short haul" itself where an internal segment of a multi-carrier through route invokes § 3 (4)?[5]

Section 3 (4) narrowly construed to include only lines that physically abut, would, of course, lift some cases from § 1 (4) and from § 15. But those are the exceptions, relatively few in number. The Court multiplies those almost without end when it holds that any interior segment of an established multi-carrier through route is a "connecting line" within the meaning of § 3 (4).

Today's decision uproots the established concept of "through routes." As we stated in *Thompson* v. *United*

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course, describes the Bieber route from southern California to Portland.

[5] Congress has refused, although requested to do so by the Commission, to repeal § 15 (4). See *Thompson* v. *United States, supra,* at 555.

States, 343 U. S. 549, 557 (quoting from the Commission's 21st Annual Report to Congress):

> "A through route is a continuous line of railway formed by an arrangement, express or implied, between connecting carriers. . . . Existence of a through route is to be determined by the incidents and circumstances of the shipment, such as the billing, the transfer from one carrier to another, the collection and division of transportation charges, or the use of a proportional rate to or from junction points or basing points. These incidents named are not to be regarded as exclusive of others which may tend to establish a carrier's course of business with respect to through shipments."

Then we added:

> "In short, the test of the existence of a 'through route' is *whether the participating carriers hold themselves out as offering through transportation service.* Through carriage implies the existence of a through route whatever the form of the rates charged for the through service." *Ibid.* (Italics added.)

And see *Denver & R. G. W. R. Co.* v. *Union P. R. Co.*, 351 U. S. 321, 327, 330.

Here there has been no "holding out" by the participating carriers (either consensually or as a result of any Commission action) that offers this interior segment of this multi-carrier route to become a part of any "through route." If we are to allow § 1 (4) and §§ 3 (4) and 15 (3) to exist in harmony, we must adhere to that requirement, restricting "connecting line" to those lines that have a direct physical connection with the allegedly discriminating carrier.

Atlantic Coast Line R. Co. v. *United States*, 284 U. S. 288, is not opposed. While the line in question was only a segment in a multi-carrier system, it had "through routes" with the other carriers in controversy. *Id.,* at 292. The words "connecting lines" [6] were therefore used to include "all the lines making up a through route." *Id.,* at 293. But there is no "through route" here, the defendants not having agreed to one and the Commission having expressly disallowed one pursuant to its power under § 15 (3).

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[6] Section 3 (4) was not involved. What was in litigation was the construction of one of its earlier orders allowing one carrier to lease another. Commission approval was accompanied by conditions assuring "equal service, routing, and movement of competitive traffic to and from all connecting lines" reached by the lessee. 284 U. S., at 292. It was in that context that the Court held that carriers were protected even though their rails did not "physically abut" on the rails of the lessee. 284 U. S., at 293.

HAZELTINE RESEARCH, INC., ET AL. *v.* BRENNER, COMMISSIONER OF PATENTS.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 57. Argued November 17, 1965.—Decided December 8, 1965.

A patent application pending in the Patent Office at the time a second application is filed constitutes part of the "prior art" within the meaning of 35 U. S. C. § 103. *Alexander Milburn Co.* v. *Davis-Bournonville Co.,* 270 U. S. 390, followed. Pp. 254–256.

119 U. S. App. D. C. 261, 340 F. 2d 786, affirmed.

Laurence B. Dodds argued the cause for petitioners. With him on the briefs was *George R. Jones.*

J. William Doolittle argued the cause for respondent. On the brief were *Solicitor General Marshall, Assistant Attorney General Douglas* and *Lawrence R. Schneider.*

Irwin M. Aisenberg filed a brief, as *amicus curiae,* urging reversal.

MR. JUSTICE BLACK delivered the opinion of the Court.

The sole question presented here is whether an application for patent pending in the Patent Office at the time a second application is filed constitutes part of the "prior art" as that term is used in 35 U. S. C. § 103 (1964 ed.), which reads in part:

> "A patent may not be obtained . . . if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art . . . ."

The question arose in this way. On December 23, 1957, petitioner Robert Regis filed an application for a patent on a new and useful improvement on a microwave switch. On June 24, 1959, the Patent Examiner denied Regis' application on the ground that the invention was not one which was new or unobvious in light of the prior art and thus did not meet the standards set forth in § 103. The Examiner said that the invention was unpatentable because of the joint effect of the disclosures made by patents previously issued, one to Carlson (No. 2,491,644) and one to Wallace (No. 2,822,526). The Carlson patent had been issued on December 20, 1949, over eight years prior to Regis' application, and that patent is admittedly a part of the prior art insofar as Regis' invention is concerned. The Wallace patent, however, was pending in the Patent Office when the Regis application was filed. The Wallace application had been pending since March 24, 1954, nearly three years and nine months before Regis filed his application and the Wallace patent was issued on February 4, 1958, 43 days after Regis filed his application.[1]

After the Patent Examiner refused to issue the patent, Regis appealed to the Patent Office Board of Appeals on the ground that the Wallace patent could not be properly considered a part of the prior art because it had been a "co-pending patent" and its disclosures were secret and not known to the public. The Board of Appeals rejected this argument and affirmed the decision of the Patent Examiner. Regis and Hazeltine, which had an interest as assignee, then instituted the present action in the District Court pursuant to 35 U. S. C. § 145 (1964 ed.) to compel the Commissioner to issue the patent. The District Court agreed with the Patent Office that the co-pending Wallace application was a part of the prior art and directed that the complaint be dismissed. 226 F. Supp. 459. On appeal the Court of Appeals affirmed *per curiam.* 119 U. S. App. D. C. 261, 340 F. 2d 786. We granted certiorari to decide the question of whether a co-pending application is included in the prior art, as that term is used in 35 U. S. C. § 103. 380 U. S. 960.

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[1] It is not disputed that Regis' alleged invention, as well as his application, was made after Wallace's application was filed. There is, therefore, no question of priority of invention before us.

Petitioners' primary contention is that the term "prior art," as used in § 103, really means only art previously publicly known. In support of this position they refer to a statement in the legislative history which indicates that prior art means "what was known before as described in section 102." [2] They contend that the use of the word "known" indicates that Congress intended prior art to include only inventions or discoveries which were already publicly known at the time an invention was made.

If petitioners are correct in their interpretation of "prior art," then the Wallace invention, which was not publicly known at the time the Regis application was filed, would not be prior art with regard to Regis' invention. This is true because at the time Regis filed his application the Wallace invention, although pending in the Patent Office, had never been made public and the Patent Office was forbidden by statute from disclosing to the public, except in special circumstances, anything contained in the application.[3]

The Commissioner, relying chiefly on *Alexander Milburn Co.* v. *Davis-Bournonville Co.,* 270 U. S. 390, contends that when a patent is issued, the disclosures contained in the patent become a part of the prior art as of the time the application was filed, not, as petitioners contend, at the time the patent is issued. In that case a patent was held invalid because, at the time it was applied for, there was already pending an application which completely and adequately described the invention. In holding that the issuance of a patent based on the first application barred the valid issuance of a patent based on the second application, Mr. Justice Holmes, speaking for the Court, said, "The delays of the patent office ought not to cut down the effect of what has been done. . . . [The first applicant] had taken steps that would make it public as soon as the Patent Office did its work, although, of course, amendments might be required of him before the end could be reached. We see no reason in the words or policy of the law for allowing [the second applicant] to profit by the delay . . . ." At p. 401.

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[2] H. R. Rep. No. 1923, 82d Cong., 2d Sess., p. 7 (1952).

[3] 35 U. S. C. § 122 (1964 ed.) states: "Applications for patents shall be kept in confidence by the Patent Office and no information concerning the same given without authority of the applicant or owner unless necessary to carry out the provisions of any Act of Congress or in such special circumstances as may be determined by the Commissioner."

In its revision of the patent laws in 1952, Congress showed its approval of the holding in *Milburn* by adopting 35 U. S. C. § 102 (e) (1964 ed.) which provides that a person shall be entitled to a patent unless "(e) the invention was described in a patent granted on an application for patent by another filed in the United States before the invention thereof by the applicant for patent." Petitioners suggest, however, that the question in this case is not answered by mere reference to § 102 (e), because in *Milburn,* which gave rise to that section, the copending applications described the same identical invention. But here the Regis invention is not precisely the same as that contained in the Wallace patent, but is only made obvious by the Wallace patent in light of the Carlson patent. We agree with the Commissioner that this distinction is without significance here. While we think petitioners' argument with regard to § 102 (e) is interesting, it provides no reason to depart from the plain holding and reasoning in the *Milburn* case. The basic reasoning upon which the Court decided the *Milburn* case applies equally well here. When Wallace filed his application, he had done what he could to add his disclosures to the prior art. The rest was up to the Patent Office. Had the Patent Office acted faster, had it issued Wallace's patent two months earlier, there would have been no question here. As Justice Holmes said in *Milburn,* "The delays of the patent office ought not to cut down the effect of what has been done." P. 401.

To adopt the result contended for by petitioners would create an area where patents are awarded for unpatentable advances in the art. We see no reason to read into § 103 a restricted definition of "prior art" which would lower standards of patentability to such an extent that there might exist two patents where the Congress has plainly directed that there should be only one.

Affirmed.

GUNTHER *v.* SAN DIEGO & ARIZONA EASTERN RAILWAY CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 27. Argued November 8, 1965.—Decided December 8, 1965.

Petitioner after long employment as an engineer was removed from service following an adverse physical report by respondent railroad's physicians. His own doctor thereafter examined petitioner and pronounced him fit to work. When the railroad rejected petitioner's request for re-examination or restoration to service, he filed with the Railroad Adjustment Board a claim for reinstatement and back pay. The Board appointed a three-doctor committee, which found petitioner fit to act as an engineer. The Board, having interpreted seniority and other provisions of the collective bargaining agreement as guaranteeing petitioner's continued service while physically qualified, ordered his reinstatement with back pay for time lost. Upon the railroad's refusal to comply, petitioner brought this enforcement action in District Court. That court refused to uphold the Board's order, finding nothing in the collective bargaining agreement to limit the railroad's right to remove petitioner upon a medical disability finding by its physicians. The Court of Appeals affirmed. *Held:*

1. The Adjustment Board, an experienced representative body created by § 3 of the Railway Labor Act for settling disputes in the railroad industry, including interpretation of agreements, did not abuse its discretion by its interpretation of the collective bargaining agreement or its appointment of the medical board and reliance on its findings. Pp. 261–262.

2. A federal district court under § 3 First (m) of the Railway Labor Act, which provides for finality of Adjustment Board awards "except insofar as they shall contain a money award," cannot open up the Board's finding on the merits merely because its determination on the central issue of wrongful discharge included a money award. Pp. 263–264.

3. The District Court has power under the Act to determine the separable issue of the size of the money award for lost time; in making that determination, the court can evaluate any changes in

petitioner's health in the seven years since the Board heard and decided the case. Pp. 264-265.

336 F. 2d 543, reversed and remanded.

Charles W. Decker argued the cause for petitioner. With him on the brief was *Clifton Hildebrand.*

Waldron A. Gregory argued the cause for respondent. With him on the brief was *William R. Denton.*

Clarence M. Mulholland, Edward J. Hickey, Jr., and *Richard R. Lyman* filed a brief for the Railway Labor Executives' Association, as *amicus curiae,* urging reversal.

MR. JUSTICE BLACK delivered the opinion of the Court.

The petitioner, Gunther, worked as a fireman for respondent railroad for eight years, from 1916 to 1924, and as an engineer for 30 years, from 1924 until December 30, 1954. On that date, shortly after his seventy-first birthday, he was removed from active service because of an alleged physical disability. The railroad's action was taken on the basis of reports made by its physicians, after physical examinations of petitioner, that in their opinion he was no longer physically qualified to work as a locomotive engineer because his "heart was in such condition that he would be likely to suffer an acute coronary episode." Dissatisfied with the railroad doctors' findings, Mr. Gunther went to a recognized specialist who, after examination, concluded that petitioner was qualified physically to continue work as an engineer. On the basis of this report petitioner requested the railroad to join him in the selection of a three-doctor board to re-examine his physical qualifications for return to service. The railroad refused. This disagreement led to prolonged litigation which has reached us 11 years after the controversy arose.

When the railroad refused to consent to the appointment of a new board of doctors to re-examine petitioner or to restore him to service, he filed a claim for reinstatement and back pay with the Railroad Adjustment Board, which was created by § 3 of the Railway Labor Act, as amended,[1] to adjust, among other things, disputes of railroads and their employees "growing out of grievances or out of the interpretation or application of agreements concerning . . . rules, or working conditions . . . ."[2] The Adjustment Board, over the protests of the railroad, decided it had jurisdiction of the grievance and then, referring to past practice in similar cases, proceeded, as its findings show, to appoint a committee of three qualified physicians, to re-examine petitioner, "one chosen by carrier and one by the employe and the third by the two so selected, for the purpose of determining the facts as to claimant's disability and the propriety of his removal from service. . . ." Subsequently, this committee of doctors examined petitioner and decided by a majority vote that he was physically qualified to act as an engineer, contrary to the prior findings of the railroad's doctors. Upon the basis of these findings the Adjustment Board decided that the railroad had been wrong in disqualifying petitioner for service and sustained his claim "for reinstatement with pay for all time lost from October 15, 1955 . . . ." The railroad refused to comply with the Board's order and petitioner as authorized by the Act[3]

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[1] 48 Stat. 1185, 45 U. S. C. § 151 *et seq.* (1964 ed.).

[2] Section 3 First (i), 48 Stat. 1191, 45 U. S. C. § 153 First (i) (1964 ed.). This section also provides that disputes between railroad employees and their employers "failing to reach an adjustment . . . may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

[3] Section 3 First (p), 48 Stat. 1192, 45 U. S. C. § 153 First (p) (1964 ed.), provides:

"If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner . . . may file in the District Court of the United States for filed this action in a district court of the United States for an appropriate court order to enforce the Adjustment Board's award. After hearings the District Court, in its third opinion in the case, held the award erroneous and refused to enforce it.[4] The District Court's refusal was based on its conclusion that there were no express or implied provisions in the collective bargaining contract which in the court's judgment limited in any way what it found to be the absolute right of the railroad, in absence of such provisions, to remove petitioner from active service whenever its physicians found in good faith "that plaintiff was physically disqualified from such service." The Court of Appeals affirmed, agreeing with the interpretation put upon the contract by the District Court, and thereby rejected the Board's interpretation of the contract and its decision on the merits of the dispute. 336 F. 2d 543. We granted certiorari because the holding of the two courts below seemed, in several respects, to run counter to the requirements of the Railway Labor Act as we have construed it. 380 U. S. 905.

I. Section 3 First (i) of the Railway Labor Act provides that "disputes between an employee or group of

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the district in which he resides or in which is located the principal operating office of the carrier . . . a petition setting forth briefly . . . the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated . . . . The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board."

[4] 192 F. Supp. 882, 198 F. Supp. 402. The third opinion written by the court is not reported.

employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements" are to be handled by the Adjustment Board. In § 3 Congress has established an expert body to settle "minor" grievances like petitioner's which arise from day to day in the railroad industry. The Railroad Adjustment Board, composed equally of representatives of management and labor is peculiarly familiar with the thorny problems and the whole range of grievances that constantly exist in the railroad world. Its membership is in daily contact with workers and employers, and knows the industry's language, customs, and practices. See *Slocum* v. *Delaware, L. & W. R. Co.,* 339 U. S. 239, 243–244. The Board's decision here fairly read shows that it construed the collective bargaining provisions which secured seniority rights, together with other provisions of the contract, as justifying an interpretation of the contract guaranteeing to petitioner "priority in service according to his seniority and pursuant to the agreement so long as he is physically qualified." The District Court, whose opinion was affirmed by the Court of Appeals, however, refused to accept the Board's interpretation of this contract. Paying strict attention only to the bare words of the contract and invoking old common-law rules for the interpretation of private employment contracts, the District Court found nothing in the agreement restricting the railroad's right to remove its employees for physical disability upon the good-faith findings of disability by its own physicians. Certainly it cannot be said that the Board's interpretation was wholly baseless and completely without reason. We hold that the District Court and the Court of Appeals as well went beyond their province in rejecting the Adjustment Board's interpretation of this railroad collective bargaining agreement. As hereafter pointed out Congress, in the Railway Labor Act, invested the Adjustment Board with the broad power to arbitrate grievances and plainly intended that interpretation of these controversial provisions should be submitted for the decision of railroad men, both workers and management, serving on the Adjustment Board with their long experience and accepted expertise in this field.

II. The courts below were also of the opinion that the Board went beyond its jurisdiction in appointing a medical board of three physicians to decide for it the question of fact relating to petitioner's physical qualifications to act as an engineer. We do not agree. The Adjustment Board, of course, is not limited to common-law rules of evidence in obtaining information. The medical board was composed of three doctors, one of whom was appointed by the company, one by petitioner, and the third by these two doctors. This not only seems an eminently fair method of selecting doctors to perform this medical task but it appears from the record that it is commonly used in the railroad world for the very purpose it was used here. In fact the record shows that under respondent's present collective bargaining agreement with its engineers provision is made for determining a dispute precisely like the one before us by the appointment of a board of doctors in precisely the manner the Board used here. This Court has said that the Railway Labor Act's "provisions dealing with the Adjustment Board were to be considered as compulsory arbitration in this limited field."[5] On a question like the one before us here, involving the health of petitioner, and his physical ability to operate an engine, arbitrators would probably find it difficult to find a better method for arriving at the truth than by the use of doctors selected as these doctors were. We reject the idea that the Adjustment

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[5] *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana R. Co.,* 353 U. S. 30, 39.

Board in some way breached its duty or went beyond its power in relying as it did upon the finding of this board of doctors.

III. Section 3 First (m) provides that Adjustment Board awards "shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award."[6] The award of the Board in this case, based on the central finding that petitioner was wrongfully removed from service is twofold, consisting both of an order of reinstatement and the money award for lost earnings. Thus there arises the question of whether the District Court may open up the Board's finding on the merits that the railroad wrongfully removed petitioner from his job merely because one part of the Board's order contained a money award. We hold it cannot. This Court time and again has emphasized and re-emphasized that Congress intended minor grievances of railroad workers to be decided finally by the Railroad Adjustment Board. In *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana R. Co.,* 353 U. S. 30, the Court gave a Board decision the same finality that a decision of arbitrators would have. In *Union Pacific R. Co.* v. *Price,* 360 U. S. 601, the Court discussed the legislative history of the Act at length and pointed out that it "was designed for effective and final decision of grievances which arise daily" and that its "statutory scheme cannot realistically be squared with the contention that Congress did not purpose to foreclose litigation in the courts over grievances submitted to and disposed of by the Board . . . ." 360 U. S., at 616. Also in *Locomotive Engineers* v. *Louisville & Nashville R. Co.,* 373 U. S. 33, the Court said that prior decisions of this Court had made it clear that the Adjustment Board provisions were to be considered as "compulsory arbitration in this limited field," p. 40, "the complete and final means for settling minor disputes," p. 39, and "a mandatory, exclusive, and comprehensive system for resolving grievance disputes." P. 38.

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[6] 48 Stat. 1191, 45 U. S. C. § 153 First (m) (1964 ed.).

The Railway Labor Act as construed in the foregoing and other opinions of this Court does not allow a federal district court to review an Adjustment Board's determination of the merits of a grievance merely because a part of the Board's award, growing from its determination on the merits, is a money award. The basic grievance here—that is, the complaint that petitioner has been wrongfully removed from active service as an engineer because of health—has been finally, completely, and irrevocably settled by the Adjustment Board's decision. Consequently, the merits of the wrongful removal issue as decided by the Adjustment Board must be accepted by the District Court.

IV. There remains the question of further proceedings in this case with respect to the money aspect of the Board's award. The Board did not determine the amount of back pay due petitioner on account of his wrongful removal from service. It merely sustained petitioner's claim for "reinstatement with pay for all time lost from October 15, 1955." Though the Board's finding on the merits of the wrongful discharge must be accepted by the District Court, it has power under the Act to determine the size of the money award. The distinction between court review of the merits of a grievance and the size of the money award was drawn in *Locomotive Engineers* v. *Louisville & Nashville R. Co., supra,* at pp. 40–41, when it was said that the computation of a time-lost award is "an issue wholly separable from the merits of the wrongful discharge issue." On this separable issue the District Court may determine in this action how much time has been lost by reason of the wrongful removal of petitioner from active service, and any proper issues that can be raised with reference to the amount of money necessary to compensate for the time lost. In deciding this issue as to how much money petitioner will be entitled to receive because of lost time, the District Court will bear in mind the fact that the decision on the merits of the wrongful removal issue related to the time when the Board heard and decided the case. Seven years have elapsed since that time, long enough for many changes to have occurred in connection with petitioner's health. This would, of course, be relevant in determining the amount of money to be paid him in a lawsuit which can, as the statute provides, proceed on this separable issue "in all respects as other civil suits" where damages must be determined.

The judgments of the courts below are reversed and the cause is remanded to the District Court for consideration not inconsistent with this opinion.

Reversed and remanded.

UNITED STATES *v.* SPEERS, TRUSTEE IN BANKRUPTCY.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 17. Argued October 20, 1965.—Decided December 13, 1965.

Federal taxes were assessed against a company but despite demand were not paid. No notice was filed of the lien which ensued under § 6321 of the Internal Revenue Code of 1954. Thereafter the company filed a petition in bankruptcy. The trustee treated the Government as an unsecured claimant whose lien was invalid as to him, basing his position on § 70c of the Bankruptcy Act and § 6323 of the Internal Revenue Code. Section 70c vests a trustee as of the bankruptcy date with all the rights of "a creditor then holding a lien" on a bankrupt's assets by "legal . . . proceedings"; § 6323 permits a "judgment creditor" to prevail over an unrecorded federal tax lien. The trustee's position was upheld by the referee, District Court, and Court of Appeals. *Held:* A bankruptcy trustee has the status of a statutory "judgment creditor" and as such prevails over an unrecorded federal tax lien. Pp. 269–278.

(a) The language in *United States* v. *Gilbert Associates,* 345 U. S. 361, that the term "judgment creditor" in the predecessor of § 6323 referred to a holder of a judgment of a court of record, must be read in context and does not govern the rights conferred by Congress upon a trustee in bankruptcy. Pp. 269–271.

(b) The language and legislative history of § 70c and § 6323 reflect a congressional purpose to confer all the rights of a judgment creditor upon the trustee in bankruptcy, including the right to avoid an unrecorded federal tax lien. Pp. 271–275.

(c) That failure to accord the Government priority for its unrecorded lien may benefit other claimants in a bankruptcy proceeding by improving their relative positions as creditors (a result which the Government can avoid by promptly filing notice of the lien) is a matter of congressional policy. Pp. 275–277.

(d) The provision in § 67b of the Bankruptcy Act that a statutory lien, including a federal tax lien, not perfected until after bankruptcy may nevertheless be valid as against the trustee does not preclude construing § 6323 to include the trustee, since the purpose of § 67b insofar as tax claims are concerned is to protect them from § 60, which allows the trustee to set aside preferential transfers made within four months of bankruptcy. Pp. 277–278.

335 F. 2d 311, affirmed.

Acting Assistant Attorney General Roberts argued the cause for the United States. On the brief were *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *I. Henry Kutz.*

Robert B. Gosline argued the cause and filed a brief for respondent.

MR. JUSTICE FORTAS delivered the opinion of the Court.

This case presents the question whether a federal tax lien, unrecorded as of the time of bankruptcy, is valid as against the trustee in bankruptcy.

On June 3, 1960, a District Director of Internal Revenue assessed more than $14,000 in withholding taxes and interest against the Kurtz Roofing Company. Demand for payment was made, and the taxpayer refused to pay. This gave rise to a federal tax lien.[1] Notice of the lien was not filed either in the Office of the Recorder of Erie County, Ohio, where Kurtz had its principal place of business, or in the United States District Court, at least not before February of 1961.[2] On June 20, 1960, Kurtz filed a petition in bankruptcy. In the ensuing proceedings the trustee took the position that the federal tax lien was invalid as to him. He relied upon § 70c of the Bankruptcy Act, 11 U. S. C. § 110 (c) (1964 ed.), which, he asserted, vested in him the rights of a "judgment creditor," and upon 26 U. S. C. § 6323 (1964 ed.), which entitles a "judgment creditor" to prevail over an unrecorded federal tax lien. Section 70c provides in part:

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[1] 26 U. S. C. § 6321 (1964 ed.) provides: "If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person."

26 U. S. C. § 6322 (1964 ed.) provides: "Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time."

> "The trustee, as to all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exists."

Section 6323 provides in part:

> "[T]he lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate . . . ."

The trustee's position, in short, was that his statutory lien attached to all property of the bankrupt as of the date of filing of the petition; that he was a statutory "judgment creditor"; and that, under § 6323, the unrecorded tax lien of the United States was not valid against him. This position, if sustained, would reduce the Government's claim for unpaid taxes to the status of an unsecured claim, sharing fourth-class priority with unsecured state and local tax claims under § 64a (4) of the Bankruptcy Act, 11 U. S. C. § 104 (a)(4) (1964 ed.), and ranking behind administrative expenses, certain wage claims, and specified creditors' expenses.[3] The result in the present case is that instead of recovering the full amount owing to it, the United States would receive only 53.48%.

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[2] In its brief in the Court of Appeals the Government for the first time stated that notice of the lien was in fact filed with the Recorder on February 9, 1961. The statement in the referee's certificate that notice of the lien was never filed was not controverted in the District Court and, as respondent contends, there is no proof of the February filing in the record.

The trustee's position was affirmed by the referee, the District Court, and the Court of Appeals for the Sixth Circuit. 335 F. 2d 311. Certiorari was granted, 379 U. S. 958, to resolve the conceded conflict between decisions of Courts of Appeals for the Second, Third, and Ninth Circuits[4] and the decision below. We affirm.

Despite the language of the applicable statutory provisions, § 70c and § 6323, most of the Courts of Appeals passing on the question have sustained the validity of an unrecorded federal tax lien as against the trustee in bankruptcy. They have arrived at this result on the authority of a statement in *United States* v. *Gilbert Associates, Inc.*, 345 U. S. 361, 364, that the phrase

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[3] See §§ 64a (1)–(3), 11 U. S. C. §§ 104 (a)(1)–(3) (1964 ed.). Secured creditors, including those whose security was obtained subsequent to creation of the Government's lien, would have recourse to their security before any of the Bankruptcy Act priorities come into play. *Goggin* v. *California Labor Div.*, 336 U. S. 118; *City of Richmond* v. *Bird*, 249 U. S. 174. Administrative expenses and wage claims precede all other statutory liens on personal property not accompanied by possession if not enforced by sale prior to bankruptcy. § 67c, 11 U. S. C. § 107 (c) (1964 ed.); *Goggin, supra*, 126–130.

[4] See *Brust* v. *Sturr*, 237 F. 2d 135 (C. A. 2d Cir.); *In re Fidelity Tube Corp.*, 278 F. 2d 776 (C. A. 3d Cir.) (Kalodner and Hastie, JJ., dissenting), cert. denied *sub nom. Borough of East Newark* v. *United States*, 364 U. S. 828; *Simonson* v. *Granquist*, 287 F. 2d 489 (C. A. 9th Cir.) (Hamley, J., expressing contrary views), rev'd on other grounds, 369 U. S. 38. See also *United States* v. *England*, 226 F. 2d 205 (C. A. 9th Cir.); *In re Taylorcraft Aviation Corp.*, 168 F. 2d 808, 810 (C. A. 6th Cir.) (dictum).

"judgment creditor" in § 3672, the predecessor of § 6323, was used by Congress "in the usual, conventional sense of a judgment of a court of record . . . ."

It is clear, however, that this characterization was not intended to exclude a trustee in bankruptcy from the scope of the phrase "judgment creditor." The issue before the Court in *Gilbert* was quite different.

Gilbert involved neither a bankruptcy proceeding nor the rights of a trustee in bankruptcy. *Gilbert* arose out of a state insolvency proceeding. The issue was whether an unrecorded federal tax lien was valid as against a municipal tax assessment which had neither been reduced to judgment nor accorded "judgment creditor" status by any statute. The asserted superior position of the local tax claim was based upon the fact that the New Hampshire court, in the *Gilbert* insolvency proceeding, had, for the first time, conveniently characterized the local tax claim as "in the nature of a judgment," relying upon the procedures used by the taxing authorities.[5] Because the effect of federal tax liens should not be determined by the diverse rules of the various States, the Court held that the municipality was not a "judgment creditor" for purposes of the federal statute. The Court said:

> "A cardinal principle of Congress in its tax scheme is uniformity, as far as may be. Therefore, a 'judgment creditor' should have the same application in all the states. In this instance, we think Congress used the words 'judgment creditor' in § 3672 in the usual, conventional sense of a judgment of a court of record, since all states have such courts. We do not think Congress had in mind the action of taxing authorities who may be acting judicially as in New Hampshire and some other states, where the end result is something 'in the nature of a judgment,'

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[5] 345 U. S., at 363, quoting from *Petition of Gilbert Associates, Inc.*, 97 N. H. 411, 414, 90 A. 2d 499, 502.

while in other states the taxing authorities act quasi-judicially and are considered administrative bodies." (Footnotes omitted.) 345 U. S., at 364.[6]

In view of the nature of the claim for which superiority was asserted and because its dominant theme was the need for uniformity in construing the meaning of § 3672, *Gilbert* cannot be considered as governing the entirely different situation with respect to the rights conferred by Congress upon a trustee in bankruptcy. In the latter circumstance we are confronted with a specific congressional Act defining the status of the trustee. We have no problem of evaluating widely differing state laws. We have no possibility of unequal application of the federal tax laws, depending upon variances in the terms and phraseology of different state and local tax assessment statutes and judicial rulings thereon. Here we are faced with a uniform federal scheme—the rights of the trustee in bankruptcy in light of an unequivocal statement by Congress that he shall have "all" the rights of a judicial lien creditor with respect to the bankrupt's property.

The legislative history lends support to the conclusion drawn from the statutory language that the purpose of Congress was to invalidate an unrecorded federal tax lien as against the trustee in bankruptcy. It was in 1910 that Congress enacted the predecessor of § 70c, vesting the trustee "with all the rights, remedies, and powers of a judgment creditor."[7] Three years later, in 1913, Congress enacted the predecessor of § 6323, providing that an unrecorded federal tax lien was invalid as against a "judgment creditor."[8] These two statutes, with their corresponding references to "judgment creditor," co-existed for nearly 40 years. During that period, and prior to our decision in *Gilbert* in 1953, the only Court of Appeals squarely to pass upon the question decided that the trustee was a "judgment creditor" for purposes of avoiding an unrecorded federal tax lien. *United States* v. *Sands,* 174 F. 2d 384, 385 (C. A. 2d Cir.), rejecting contrary dictum in *In re Taylorcraft Aviation Corp.*, 168 F. 2d 808, 810 (C. A. 6th Cir.).

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[6] The Government's brief also emphasized this concern for uniformity in administration of the federal tax laws. See brief for petitioner in *Gilbert,* No. 440, 1952 Term, pp. 22–24, where the Government argued: "Congress did not intend to subordinate federal tax liens to local tax liens merely because by state statute or state court decisions the local tax assessments are for local purposes denominated 'judgments' . . . . Moreover, in holding that under our 'decisions' and in 'this jurisdiction' the Town's tax assessments are 'judgments,' the court below failed to give sufficient heed to the repeated declarations of this Court that the federal revenue laws should be interpreted 'so as to give a uniform application to a nationwide scheme of taxation,' and hence their provisions are not to be deemed subject to state law unless the language of the section involved, expressly or by necessary implication, so requires."

In amending the Bankruptcy Act in 1950, Congress deleted from § 70c the phrase "judgment creditor," providing instead that whether or not the bankrupt's property was in possession or control of the court, the trustee was to have "all the rights, remedies, and powers" of a creditor holding a judicial lien.[9] Elsewhere in the same legislation it was recognized that the category of those holding judicial liens includes judgment creditors,[10] and a judicial lien holder generally has "greater rights than a judgment creditor." [11] It is clear, therefore, that, with respect to the present problem, it was not the purpose of the 1950 amendments to reduce the powers of the trustee. As the House report accompanying the legislation noted, the revision of § 70c "has been placed in the bill for the protection of trustees in bankruptcy . . . also to simplify, and to some extent expand, the general expression of the rights of trustees in bankruptcy." [12]

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[7] The Act of June 25, 1910, c. 412, 36 Stat. 840, § 8, provided in part: "such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied."

[8] Act of March 4, 1913, c. 166, 37 Stat. 1016.

[9] Act of March 18, 1950, c. 70, § 2, 64 Stat. 26, now 11 U. S. C. § 110 (c) (1964 ed.). Prior to the amendment, § 70c characterized the trustee as a lien holder as to property in the court's possession or control and as a "judgment creditor" as to property not so reduced to possession. See n. 7, *supra; Lewis* v. *Manufacturers National Bank,* 364 U. S. 603, 605–606.

In 1954 Congress dealt explicitly with the question whether the trustee ought to prevail against unrecorded federal tax liens. An unsuccessful effort was made, reflected in the House version of the proposed § 6323, expressly to exclude "artificial" judgment creditors like the trustee in bankruptcy.[13] At conference, the House conferees acceded to the views of the Senate, which deemed it "advisable to continue to rely upon judicial interpretation of existing law instead of attempting to prescribe specific statutory rules." [14] The Government suggests that the "existing law" sought to be preserved was this Court's decision in *Gilbert*. But as of the date of the 1954 amendments, *Gilbert* had not yet been applied by any court to displace the rights of the trustee in bankruptcy as against an unrecorded federal tax lien. So far as that issue is concerned, it is more likely that reference to "existing law" was to the specific and then unchallenged rule announced by the Second Circuit in *United States* v. *Sands, supra,* and by other courts in other cases holding the trustee to have the rights of a judgment creditor.[15] As we have already noted, *Gilbert* is not inconsistent with the rule announced in *Sands*.

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[10] Act of March 18, 1950, c. 70, § 1, 64 Stat. 25, now 11 U. S. C. § 96 (a)(4) (1964 ed.). See 4 Collier, Bankruptcy ¶ 70.49, n. 3, at 1415 (1964 ed.).

[11] See, *e. g.,* H. R. Rep. No. 745, 86th Cong., 1st Sess., to accompany H. R. 7242, p. 10: "As a matter of general law the holder of a lien by legal proceedings has greater rights than a judgment creditor . . . . It would seem anomalous to allow judgment creditors to prevail over secret tax liens and to deny that right to a judicial lien holder."

[12] H. R. Rep. No. 1293, 81st Cong., 1st Sess., to accompany S. 88, p. 7. That this was the tenor of the amendment is generally conceded. See, *e. g., In re Fidelity Tube Corp.,* 278 F. 2d 776, 781, 786–787 (both majority and dissenting opinions); 4 Collier, *op. cit. supra,* at 1415; Seligson, Creditors' Rights, 32 N. Y. U. L. Rev. 708, 710 (1957).

[13] The proposed legislation was to make clear that "such protection is not extended to a judgment creditor who does not have a valid judgment obtained in a court of record and of competent jurisdiction" and that "particular persons shall not be treated as judgment creditors because State or Federal law artificially provides or concedes such persons rights or privileges of judgment creditors, or even designates them as such, when they have not actually ob-

In recent years, and since the view began to spread that *Gilbert* compelled exclusion of the trustee from the benefits of § 6323, legislation has been introduced expressly to reiterate the trustee's power to upset unrecorded federal tax liens.[16] Such legislation was proposed

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tained a judgment in the conventional sense." H. R. Rep. No. 1337, 83d Cong., 2d Sess., to accompany H. R. 8300, p. A407. See Treas. Reg. on Procedure and Administration (1954 Code) § 301.6323-1 (26 CFR § 301.6323-1), incorporating the material rejected by the Eighty-third Congress.

[14] S. Rep. No. 1622, 83d Cong., 2d Sess., to accompany H. R. 8300, p. 575; H. R. Conf. Rep. No. 2543, 83d Cong., 2d Sess., to accompany H. R. 8300, p. 78.

[15] *E. g., Sampsell* v. *Straub*, 194 F. 2d 228, 231 (C. A. 9th Cir.), cert. denied, 343 U. S. 927; *McKay* v. *Trusco Finance Co.*, 198 F. 2d 431, 433 (C. A. 5th Cir.); *In re Lustron Corp.*, 184 F. 2d 789 (C. A. 7th Cir.), cert. denied *sub nom. Reconstruction Finance Corp.* v. *Lustron Corp.*, 340 U. S. 946.

[16] On two occasions the proposed legislation was approved by the appropriate House and Senate committees, and one bill received the assent of both Houses. See H. R. 7242, 86th Cong., § 6, vetoed by President on September 8, 1960, 106 Cong. Rec. 19168; H. R. 394, 88th Cong., § 6; H. R. 136, 89th Cong., § 6.

not to alter the statutory scheme, but to remove what was thought to be an erroneous gloss placed upon it by the courts. Thus, both Senate and House committee reports accompanying a recent bill, H. R. 394, 88th Cong., reflect the belief that those decisions upon which the Government now relies "would appear to be contrary to the legislative purpose which gave the trustee all the rights of an ideal judicial lien creditor."[17]

In light of these legislative materials—the adoption of the phrase "judgment creditor" in both statutes, the legislative broadening of § 70c in 1950, and the expressions of congressional discontent with recent decisions excluding the trustee from § 6323—we are persuaded that, read together, § 6323 and § 70c entitle the trustee to prevail over unrecorded federal tax liens.

The Government seeks to ward off this result with the argument that so to read the statutes is to confer upon certain classes of creditors "windfalls" unwarranted by the equities of their situation. The question may, however, be stated less invidiously than the argument indicates: it is whether the Government, unlike other creditors, and contrary to the general policy against secret liens, should be given advantage of a lien which it has not recorded as of the date of bankruptcy.[18] It is true that the consequence of depriving the United States of claimed priority for its secret lien is to improve the relative position of creditors—if there are any not already protected by § 6323—whose security was obtained subsequent to the Government's lien and who, once the federal lien is invalidated, have a prior claim to the secured assets. And our decision will enhance the possibility that there will be something in the bankrupt's estate for those claimants whose priorities are higher than that afforded unsecured tax claims,[19] as well as for state and local tax claims which share with the Federal Government the priority in § 64a (4), 11 U. S. C. § 104 (a)(4). Whether this result is inadvisable need not detain us,[20] for the question is one of policy which in our view has been decided by Congress in favor of the trustee. In any event, it is possible for the Government in cases which it deems appropriate, to avoid a result which it regards with unhappiness by promptly filing notice of its lien.[21] Should experience indicate that inclusion of the trustee within § 6323 is inadvisable, the fact will not be lost upon Congress.

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[17] H. R. Rep. No. 454, 88th Cong., 1st Sess., p. 10; S. Rep. No. 1133, 88th Cong., 2d Sess., p. 11.

[18] In enacting the predecessor of § 6323 in 1913, Congress seems generally to have answered this question in the negative—and against secret liens. See H. R. Rep. No. 1018, 62d Cong., 2d Sess., pp. 1–2.

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[19] See §§ 64a (1)–(3), 11 U. S. C. §§ 104 (a)(1)–(3), giving priority to claims for administrative expenses, wages, and certain creditors' expenses. The claims of general creditors are, of course, in no way affected by our decision. And in some circumstances administrative expense and wage claimants would in any case prevail over the Government's lien. See n. 3, *supra*.

[20] We note that failure of the Government to record its lien may work a hardship upon persons subsequently extending credit in ignorance of the unrecorded lien, and that nondisclosure may induce others to incur administrative or other expenses which they would not incur if there were no hope of repayment. Moreover, state and local governments might reduce their claims to judgment if they knew of the existence of a federal lien. See Memorandum of Chairman, Drafting Committee of National Bankruptcy Conference, contained in S. Rep. No. 1133, 88th Cong., 2d Sess., to accompany H. R. 394, pp. 24–25.

[21] In its letter to Senator Eastland opposing H. R. 394, dated September 8, 1961, the Treasury asserted that "The Service has, as a matter of administrative practice, exercised forbearance as a creditor in cases when there exists a reasonable possibility that the business can regain financial stability. Enactment of the proposed amendments . . . could well force the service to change this practice, which it is believed has been proved by experience to be highly desirable." S. Rep. No. 1133, 88th Cong., 2d Sess., p. 18. This same argument was made to an earlier Congress and rejected. See letter from Treasury, dated Aug. 9, 1960, in opposition to H. R. 7242, contained in S. Rep. No. 1871, 86th Cong., 2d Sess., p. 36.

The Government advances one last and quite novel[22] argument predicated upon § 67b of the Bankruptcy Act, 11 U. S. C. § 107 (b) (1964 ed.), which provides:

> "The provisions of section 60 of this Act to the contrary notwithstanding, statutory liens [including those] for taxes and debts owing to the United States or to any State or any subdivision thereof . . . may be valid against the trustee, even though arising or perfected while the debtor is insolvent and within four months prior to the filing of the petition . . . . Where by such laws such liens are required to be perfected and arise but are not perfected before bankruptcy, they may nevertheless be valid, if perfected within the time permitted by and in accordance with the requirements of such laws . . . ."

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[22] In the Court of Appeals the Government advanced, as an alternative basis for disposition of the case, the contention that pursuant to § 67b the alleged filing of notice in February of 1961 retroactively validated the lien as against the trustee. The court declined to reach the merits of this claim, noting that it had not been presented either to the referee or to the District Court and that there was no proof of record with respect to the alleged February filing. 335 F. 2d, at 314.

The § 67b argument raised in this Court differs from that rejected below, for that subsection is now cited to us as an aid in construing the relationship between § 70c and § 6323. Insofar as it is relevant to the particular problem of statutory construction presented by this case, we regard the § 67b argument as properly before us, for "Where the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived." *United States* v. *Fisher,* 2 Cranch 358, 386 (Marshall, C. J.). See also *United States* v. *Hutcheson,* 312 U. S. 219; *Estate of Sanford* v. *Commissioner,* 308 U. S. 39, 42-44; *United States* v. *Aluminum Co. of America,* 148 F. 2d 416, 429 (C. A. 2d Cir.) (L. Hand, J.).

The contention is that the lower court's reading of § 70c and § 6323 cannot be correct, for it precludes the possibility which appears to be contemplated by § 67b—that a federal tax lien not perfected until after bankruptcy may nevertheless be "valid against the trustee." We find no such inconsistency. The purpose of § 67b, insofar as tax claims are concerned, is to protect them from § 60, 11 U. S. C. § 96 (1964 ed.), which permits the trustee to avoid transfers made within four months of bankruptcy. Thus § 67b permits an otherwise inchoate federal tax claim to be "perfected" by assessment and demand within the four months prior to bankruptcy or afterwards.[23] It does not nullify or purport to nullify the consequences which flow from the Government's failure to file its perfected lien prior to the date when the trustee's rights as a statutory judgment creditor attach—namely, on filing of the petition in bankruptcy.[24] There is no indication in the language of § 67b, in the legislative history, or in decisions of any court, that the subsection was intended to affect the construction or application of § 6323. In any event, we should hesitate to read § 67b as relevant to the relationship between § 70c and § 6323, for Congress in the very legislation proposed to clarify the trustee's rights under § 6323 did consider § 67b, and evidenced no awareness of interrelationship or of inconsistency.[25]

Affirmed.

MR. JUSTICE BLACK, dissenting.

Section 6323 of the 1954 Internal Revenue Code provides that an unfiled tax lien is not "valid as against any mortgagee, pledgee, purchaser, or judgment creditor . . . ." The Court here holds that a bankruptcy trustee must be treated as if he were a "judgment creditor" thereby reducing government tax claims to the level of unsecured creditors. I am unable to agree. A bankruptcy trustee cannot be treated as a judgment creditor except by giving that term an entirely artificial, fictional meaning. The Court justifies this extraordinary twist of meaning by reference to § 70c of the Bankruptcy Act, 11 U. S. C. § 110 (c) (1964 ed.). That section, so far as here pertinent, provides:

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[23] See *Simonson* v. *Granquist,* 369 U. S. 38, 41; 4 Collier, *op. cit. supra,* ¶ 67.20, at 183; cf. *Lewis* v. *Manufacturers National Bank, supra,* at 609.

[24] 4 Collier, *op. cit. supra,* ¶ 67.26, at 283–286, and ¶ 70.48, at 1407.

[25] See legislative materials cited at notes 11, 16, and 17, *supra.*

> "c. . . . The trustee, as to all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exists."

This language gives no intimation of a purpose to destroy a valid tax lien such as the Government had here when bankruptcy occurred. The section's terms simply show a purpose to make sure that all the property the bankrupt had before bankruptcy will be vested in the trustee. It stretches this language entirely too much to say it was intended to change the law so drastically that the mere appointment of a trustee could render invalid a government tax lien which was perfectly valid the moment before bankruptcy. Nor can this section fairly be read as an attempt by Congress to nullify valid government tax liens by placing the claims of all unsecured creditors of the bankrupt on the same level as valid tax liens. In writing § 70c Congress was amending the bankruptcy law, not the government tax lien law that dates back nearly 100 years. I still think, as we said in *United States* v. *Gilbert Associates,* 345

U. S. 361, 364, that in enacting the predecessor of § 6323 Congress used the words "judgment creditor" in "the usual, conventional sense of a judgment of a court of record . . . ." The Second, Third, and Ninth Circuits have so construed this section. I think they were right. The Court today gives frail and inadequate support, I think, for its judicial destruction of the Government's congressionally created lien.

I would reverse this judgment.

PENNSYLVANIA PUBLIC UTILITY COMMISSION *v.* PENNSYLVANIA RAILROAD CO.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

No. 375. Decided December 13, 1965.

Appellee sued in a three-judge District Court to enjoin enforcement of an order issued by appellant state Commission on the ground of conflict with a federal statute, which appellant contended was unconstitutional. The injunction was granted. *Held:*

1. Under *Swift & Co.* v. *Wickham, ante,* p. 111, a three-judge tribunal was not required by 28 U. S. C. § 2281 for state order-federal statute conflict.

2. Nor does the defense of unconstitutionality of the federal statute require a three-judge court under 28 U. S. C. § 2282, which applies only where an injunction is sought to restrain the enforcement of an Act of Congress. *Garment Workers* v. *Donnelly Co.,* 304 U. S. 243, 250.

3. Since the direct appeal to this Court, taken prior to the *Wickham* decision, must be dismissed for lack of jurisdiction, the judgment is vacated and remanded to the District Court to enter a fresh decree from which a timely appeal may be taken to the Court of Appeals.

240 F. Supp. 233, vacated and remanded.

William A. Goichman and *Joseph C. Bruno* for appellant.

Hugh B. Cox and *Windsor F. Cousins* for appellee.

PER CURIAM.

In the three-judge District Court from which this appeal comes to us, the Pennsylvania Railroad Company sued to enjoin the enforcement of a duly promulgated order of the Pennsylvania Public Utility Commission on the sole ground that the order conflicted with a federal statute. The Commission, among other defenses, contended that the federal statute was unconstitutional, but the District Court decided the case in favor of the railroad and issued an appropriate injunction. 240 F. Supp. 233.

It follows from our recent decision in *Swift & Co.* v. *Wickham, ante,* p. 111, that the injunction sought by the railroad, being based on incompatibility between the state order and the federal statute, was not grounded in the "unconstitutionality" of a state measure so as to require a three-judge tribunal under 28 U. S. C. § 2281 (1964 ed.). Nor is § 2282, requiring such a tribunal in order to enjoin "any Act of Congress for repugnance to the Constitution," invoked by the Commission's defense that the federal statute is unconstitutional; it is settled that this provision "does not provide for a case where the validity of an Act of Congress is merely drawn in question, albeit that question be decided, but only for a case where there is an application for an interlocutory or permanent injunction to restrain the enforcement of an Act of Congress." *Garment Workers* v. *Donnelly Co.,* 304 U. S. 243, 250.

Because a three-judge court was not required to adjudicate this suit, this Court has no jurisdiction under 28 U. S. C. § 1253 (1964 ed.) to entertain a direct appeal. It does not appear from the record that the Commission lodged a protective appeal in the Court of Appeals, and the time to do so has almost certainly expired. The appeal to this Court occurred before *Swift & Co.* v. *Wickham, supra,* was decided, and there is no reason why the Commission should be deprived of appellate review. In accordance with precedent, we vacate the judgment below and remand the case to the District Court so that it may enter a fresh decree from which a timely appeal may be taken to the Court of Appeals. See *Phillips* v. *United States,* 312 U. S. 246, 254.

It is so ordered.

ALBANESE *v.* N. V. NEDERL. AMERIK STOOMV. MAATS. ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 523. Decided December 13, 1965.*

346 F. 2d 481, certiorari denied in Nos. 557 and 654; and in No. 523 certiorari granted, judgment reversed and District Court judgment reinstated.

Philip F. DiCostanzo and *Robert Klonsky* for petitioner in No. 523. *Sidney A. Schwartz* and *Joseph Arthur Cohen* for petitioner in No. 557.

Edmund F. Lamb for respondent N. V. Nederl. Amerik Stoomv. Maats. in Nos. 523 and 557 and for petitioner in No. 654.

Arthur J. Mandell for the American Trial Lawyers Association Admiralty Section, as *amicus curiae,* in support of the petition in No. 523.

PER CURIAM.

The motion of the American Trial Lawyers Association for leave to file a brief, as *amicus curiae,* is granted. The petition for certiorari in No. 523, *Albanese* v. *N. V. Nederl. Amerik Stoomv. Maats.,* is also granted.

We believe that the judgment of the Court of Appeals setting aside the judgment for petitioner Albanese on the ground that the trial court incorrectly charged the jury on the issue of negligence is erroneous. *Gutierrez* v. *Waterman S. S. Corp.,* 373 U. S. 206.

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*Together with No. 557, *International Terminal Operating Co., Inc.* v. *N. V. Nederl. Amerik Stoomv. Maats.;* and No. 654, *N. V. Nederl. Amerik Stoomv. Maats.* v. *Albanese et al.,* also on petitions for writs of certiorari to the same court.

In its opinion the Court of Appeals also stated that the District Court incorrectly instructed the jury as to the applicability of the Safety and Health Regulations for Longshoring† on the question of the shipowner's liability. But we do not read that court's opinion as making this an independent ground for ordering a new trial. So we not only reverse the judgment of the Court of Appeals in the case of Albanese but reinstate the District Court's judgment in his favor.

The petitions in No. 557, *International Terminal Operating Co.* v. *N. V. Nederl. Amerik Stoomv. Maats.;* and No. 654, *N. V. Nederl. Amerik Stoomv. Maats.* v. *Albanese,* are denied.

It is so ordered.

MR. JUSTICE HARLAN would have denied certiorari in No. 523, *Albanese* v. *N. V. Nederl. Amerik Stoomv. Maats.,* but the writ having been granted, he would have set the issues for plenary consideration. He concurs in the denial of certiorari in No. 557, *International Terminal Operating Co.* v. *N. V. Nederl. Amerik Stoomv. Maats.,* and No. 654, *N. V. Nederl. Amerik Stoomv. Maats.* v. *Albanese.*

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† 29 CFR § 9.1 *et seq.* (1963), now 29 CFR § 1504.1 (1965), promulgated by the Secretary of Labor under the authority of Public Law 85–742, 72 Stat. 835, 33 U. S. C. § 941 (1964 ed.).

SORIC *v.* IMMIGRATION AND NATURALIZATION SERVICE.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 610. Decided December 13, 1965.

Certiorari granted; 346 F. 2d 360, vacated and remanded.

Nathan T. Notkin for petitioner.

Solicitor General Marshall for respondent.

PER CURIAM.

Upon the stipulation of the parties and an examination of the entire record, the petition for a writ of certiorari is granted. The judgment of the Court of Appeals is vacated and the case is remanded to that court with instructions to remand to the Immigration and Naturalization Service for consideration of claims for relief as authorized by the 1965 amendments to the Immigration and Nationality Act.

MOODY *v.* UNITED MINE WORKERS LOCAL FOR THE UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA.

No. 852, Misc. Decided December 13, 1965.

Appeal dismissed.

PER CURIAM.

The appeal is dismissed for want of jurisdiction.

MAYBERRY *v.* PENNSYLVANIA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

No. 11, Misc. Decided December 13, 1965.

Certiorari granted; vacated and remanded.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. Upon consideration of the concessions of the State and an examination of the papers in the case, the judgment of the Supreme Court of Pennsylvania is vacated and the case remanded to that court for further proceedings.

O'CONNOR *v.* OHIO.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 281, Misc. Decided December 13, 1965.

Rehearing granted; certiorari granted; vacated and remanded.

PER CURIAM.

The petition for rehearing is granted and the order of October 11, 1965, insofar as it denies certiorari, is vacated. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is granted and the judgment is vacated. The case is remanded to the Supreme Court of Ohio for further proceedings in light of *Griffin* v. *California,* 380 U. S. 609.

TRAVIA ET AL. *v.* LOMENZO, SECRETARY OF STATE OF NEW YORK, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 633. Decided December 13, 1965.

Affirmed.

Simon H. Rifkind, Edward N. Costikyan and *Leo A. Larkin* for appellants.

Louis J. Lefkowitz, Attorney General of New York, *Daniel M. Cohen,* Assistant Solicitor General, *Donald Zimmerman,* Special Assistant Attorney General, *George D. Zuckerman,* Assistant Attorney General, and *Willis Burton Lemon* for appellees.

PER CURIAM.

The judgment is affirmed.

MR. JUSTICE HARLAN concurs in the result for the reasons stated in his acquiescence to the affirmance of the judgment in *Travia* v. *Lomenzo, ante,* p. 4, at 8.

MR. JUSTICE FORTAS took no part in the consideration or decision of this case.

UNITED STATES *v.* LOUISIANA ET AL.

No. 9, Original. Decided May 31, 1960.—Final Decree Entered December 12, 1960.—Supplemental Decree Entered December 13, 1965.

The motion by the United States for the entry of a supplemental decree is granted and a supplemental decree is entered.

Opinion reported: 363 U. S. 1; final decree reported: 364 U. S. 502.

Solicitor General Marshall for the United States.

Jack P. F. Gremillion, Attorney General of Louisiana, *John L. Madden,* Assistant Attorney General, *Paul M. Hebert, Victor A. Sachse, Thomas W. Leigh, Oliver P. Stockwell* and *J. J. Davidson* for the State of Louisiana.

Supplemental Decree.

For the purpose of giving effect to the conclusions of this Court as stated in its opinion, announced May 31, 1960, and the decree entered by this Court on December 12, 1960, it is ordered, adjudged and decreed as follows:

1. As against the defendant State of Louisiana, the United States is entitled to all the lands, minerals and other natural resources underlying the Gulf of Mexico, south of grid line y=499,394.40 on the Louisiana Plane Coordinate System, South Zone, that are more than three geographical miles seaward from a line described as follows (coordinates refer to the Louisiana Plane Coordinate System, South Zone):

> Beginning at the point where grid line y=499,394.40 intersects the line of mean low water on the eastern side of Chandeleur Island, thence southerly along the line of mean low water on the eastern side of the Chandeleur Islands, and by straight lines across channels between the islands, to the southwesternmost extremity of Errol Shoal, at latitude

29°35′48″ N., longitude 89°00′48″ W. (x=2,737,287.96, y=345,654.41); thence to Pass a Loutre lighted whistle buoy 4, at latitude 29°09′55.9″ N., longitude 88°56′54.4″ W. (x=2,761,169.19, y=189,334.14); thence to South Pass lighted whistle buoy 2, at latitude 28°58′44.9″ N., longitude 89°06′36.9″ W. (x=2,710,848.37, y=120,529.25); thence to Southwest Pass entrance mid-channel lighted whistle buoy, at latitude 28°52′37.1″ N., longitude 89°25′57.1″ W. (x=2,608,424.04, y=81,526.86); thence to Ship Shoal lighthouse at latitude 28°54′51.512″ N., longitude 91°04′15.985″ W. (x=2,083,908.09, y=90,154.12); thence to Calcasieu Pass lighted whistle buoy 1, at latitude 29°36′21.7″ N., longitude 93°19′07.6″ W. (x=1,369,080.08, y=347,060.52); thence to Sabine Pass lighted whistle buoy 1, at latitude 29°36′16″ N., longitude 93°48′31.2″ W. (x=1,213,416.18, y=349,514.72).

2. The State of Louisiana is not entitled to any interest in the lands, minerals or resources described in paragraph 1 hereof, and said State, its privies, assigns, lessees and other persons claiming under it are hereby enjoined from interfering with the rights of the United States in such lands, minerals and resources.

3. With the exceptions provided by § 5 of the Submerged Lands Act, 67 Stat. 32, 43 U. S. C. § 1313 (1964 ed.), the State of Louisiana is entitled, as against the United States, to all the lands, minerals and other natural resources in the portions of the disputed area described in this paragraph. These portions of the disputed area are bounded on the landward side by the seaward boundary of Zone 1, as delineated on Exhibit A to the parties' Interim Agreement of October 12, 1956, as amended, on file with the Court. They are bounded on the seaward side by lines three geographical miles seaward from baselines as herein described, consisting of (1) segments of, or

salient points on, the line of mean low water on the mainland, on naturally formed islands, or on naturally formed low-tide elevations situated wholly or partly within three geographical miles from the low-water line on the mainland or on such islands, and (2) straight lines across designated openings in the low-water line. As used herein, "salient point" means any point on the low-water line, so situated that there is some area within three geographical miles seaward from such point that is more than three geographical miles from all other points on the baseline. These baselines are ambulatory and subject to continual modification by natural or artificial changes in the shore line to the extent the law may provide, but for purposes of present identification and practical administration until notice by either party to the other they are described herein by their coordinates in the Louisiana Plane Coordinate System, South Zone, as shown by Exhibits 1 to 4, inclusive, filed with the Motion of the United States herein. Each three-mile line is to be drawn in such manner that every point on the three-mile line is exactly three geographical miles from the nearest point or points on the baseline, continuing in each direction until it meets another specified boundary of the particular portion of the disputed area. The portions of the disputed area referred to herein are as follows:

(a) In the vicinity of Calcasieu Pass, all that portion of the disputed area bounded on the landward side by the seaward boundary of Zone 1, and bounded on the seaward side by a line three geographical miles seaward from the tip of the western jetty, at x=1,362,416, y=397,822; from the tip of the eastern jetty, at x=1,363,392, y=397,870; and from a straight line between said points.

(b) In the vicinity of Marsh Island and Atchafalaya Bay, all that portion of the disputed area bounded on the landward side by the seaward boundary of Zone 1, and bounded on the seaward side by a line three geographical miles seaward from salient points on islands and low-tide elevations at x=1,778,769, y=324,757; x=1,782,391, y=321,876; x=1,783,067, y=321,331; x=1,791,584, y=307,545; x=1,809,845, y=296,285; x=1,820,994, y=291,804; x=1,833,527, y=271,423; x=1,834,019, y=270,301; x=1,835,344, y=270,839; x=1,843,467, y=275,912; x=1,844,320, y=278,858; x=1,875,200, y=285,729; and x=1,877,582, y=283,274; three geographical miles seaward from a straight line between South Point, Marsh Island, at x=1,863,474, y=298,772, and Point Au Fer, at x=1,993,420, y=241,930; and three geographical miles seaward from a salient point on a low-tide elevation at x=1,987,371, y=241,272.

(c) In East Bay, all that portion of the disputed area bounded on the landward side by the seaward boundary of Zone 1, and bounded on the seaward side by a line three geographical miles seaward from salient points on the mean low-water line at x=2,639,545, y=126,825; x=2,641,835, y=129,725; and x=2,644,940, y=134,910, and from the line of mean low water which may be considered to consist of straight lines between said points; three geographical miles seaward from a salient point on a low-tide elevation at x=2,672,315, y=141,745; three geographical miles seaward from the line of mean low water which may be considered to consist of straight lines between the points x=2,673,482, y=141,245; x=2,678,500, y=139,250; and x=2,682,605, y=136,895; and three geographical miles seaward from a salient point on the mean low-water line at x=2,685,325, y=133,800.

(d) Between Pass a Loutre and Breton Island, all that portion of the disputed area west of grid line x=2,740,710, bounded on the landward side by the seaward boundary of Zone 1, and bounded on the seaward side by a line three geographical miles seaward from salient points on the mainland, on islands, or on low-tide elevations at x=2,738,320, y=210,230; x=2,737,065, y=210,155; x=2,727,090, y=209,195; x=2,709,100, y=220,995; x=2,708,835, y=221,440; x=2,707,635, y=223,640; x=2,701,500, y=232,820; x=2,700,735, y=234,640; x=2,689,305, y=250,395; and x=2,688,235, y=252,215; and three geographical miles seaward from a straight line between the eastern headland of Main Pass, at x=2,681,915, y=257,755, and the southern extremity of Breton Island, at x=2,678,009, y=294,303.

4. The United States is not entitled, as against the State of Louisiana, to any interest in the lands, minerals or resources described in paragraph 3 hereof, with the exceptions provided by § 5 of the Submerged Lands Act, 43 U. S. C. § 1313.

5. All sums now held impounded by the United States under the Interim Agreement of October 12, 1956, as amended, derived from or attributable to the lands, minerals or resources described in paragraph 1 hereof are hereby released to the United States absolutely, and the United States is hereby relieved of any obligation under said agreement to impound any sums hereafter received by it, derived from or attributable to said lands, minerals, or resources.

6. All sums now held impounded by the State of Louisiana under the Interim Agreement of October 12, 1956, as amended, derived from or attributable to the lands, minerals or resources described in paragraph 3 hereof are hereby released to the State of Louisiana

absolutely, and the State of Louisiana is hereby relieved of any obligation under said agreement to impound any sums hereafter received by it, derived from or attributable to said lands, minerals or resources.

7. Within 75 days after the entry of this decree—

(a) The State of Louisiana shall pay to the United States or other persons entitled thereto under the Interim Agreement of October 12, 1956, as amended, all sums, if any, now held impounded by the State of Louisiana under said agreement, derived from or attributable to the lands, minerals or resources described in paragraph 1 hereof;

(b) The State of Louisiana shall render to the United States and file with the Court a true, full, accurate and appropriate account of any and all other sums of money derived by the State of Louisiana since June 5, 1950, either by sale, leasing, licensing, exploitation or otherwise from or on account of any of the lands, minerals or resources described in paragraph 1 hereof;

(c) The United States shall pay to the State of Louisiana or other persons entitled thereto under the Interim Agreement, as amended, all sums, if any, now held impounded by the United States under said agreement, derived from or attributable to the lands, minerals or resources described in paragraph 3 hereof;

(d) The United States shall render to the State of Louisiana and file with the Court a true, full, accurate and appropriate account of any and all other sums of money derived by the United States either by sale, leasing, licensing, exploitation or otherwise from or on account of the lands, minerals or resources described in paragraph 3 hereof.

8. Within 60 days after receiving the account provided for by paragraph 7 (b) or 7 (d) hereof, a party may serve on the other and file with the Court its objections thereto. Thereafter either party may file such motion or motions at such time as may be appropriate to have the account settled in conjunction with the issues concerning the areas still in dispute. If neither party files such an objection within 60 days, then each party shall forthwith pay to any third person any amount shown by such accounts to be payable by it to such person, and the party whose obligation to the other party is shown by such accounts to be the greater shall forthwith pay to the other party the net balance so shown to be due. If objections are filed but any undisputed net balance is shown which will be due from one party to the other party or to any third person regardless of what may be the ultimate ruling on the objections, the party so shown to be under any such obligation shall forthwith pay each such undisputed balance to the other party or other person so shown to be entitled thereto. The payments directed by paragraphs 7 (a) and 7 (c) hereof shall be made irrespective of the accounting provided for by paragraphs 7 (b) and 7 (d).

9. Until further order of the Court or agreement of the parties filed with the Court, both parties shall continue to recognize as a single lease for all purposes any existing lease now being administered under the Interim Agreement of October 12, 1956, as amended, that covers lands, minerals, or resources, part of which are described in paragraph 1 or paragraph 3 hereof and part of which remain in dispute (including any existing leasehold partly in Zone 1 and partly within the area confirmed to the United States by this decree); but the party hereby awarded part of the lands, minerals, or resources covered by any such lease shall hereafter administer the lease

as to such lands, minerals, or resources as sole lessor, shall be entitled to receive from the lessee all payments hereafter due under said lease to the extent that they are derived from or attributable to such part of the lands, minerals, or resources covered by the lease, and shall be under no duty to account for or impound any payments so received. Either party, for its own convenience, may nevertheless impound any or all of such moneys if it wishes to do so, or may terminate such impoundment in whole or in part at any time, without further order of the Court or agreement of the other party. In all other respects each such lease (including any existing leasehold partly in Zone 1 and partly within the area confirmed to the United States by this decree) shall continue to be administered as at present.

10. Nothing in this supplemental decree or the proceedings leading to it shall prejudice any rights, claims or defenses of the United States or of the State of Louisiana with respect to the remainder of the disputed area or past or future payments derived therefrom or attributable thereto or the operation of the Interim Agreement of October 12, 1956, as amended, with respect to such area and payments.

11. The Court retains jurisdiction to entertain such further proceedings, enter such orders and issue such writs as may from time to time be deemed necessary or advisable to give proper force and effect to the decree of December 12, 1960, herein, or to this decree, including, if necessary, further adjustments of the accounting between the parties with respect to the lands, minerals and resources described in paragraph 1 and paragraph 3 of this decree.

The Chief Justice and Mr. Justice Clark took no part in the consideration or decision of this motion or in the formulation of this decree.

EVANS ET AL. *v.* NEWTON ET AL.

CERTIORARI TO THE SUPREME COURT OF GEORGIA.

No. 61. Argued November 9-10, 1965.—Decided January 17, 1966.

A tract of land was willed in trust to the Mayor and City Council of Macon, Georgia, as a park for white people, to be controlled by a white Board of Managers. When the city ultimately desegregated the park, the individual Managers brought this suit in a state court against the city and the trustees of residuary beneficiaries and asked for the city's removal as trustee and the appointment of private trustees to enforce the racial limitations of the will. The city, which had alleged that it could not legally enforce segregation, asked to resign as trustee after intervention of Negro citizens who claimed that the racial limitations violated federal law. Other heirs of the testator who had also intervened asked along with the individual defendants for reversion of the property if the prayer of the petition was denied. The Georgia court, without passing on the heirs' other claims, accepted the city's resignation as trustee and appointed three new trustees. The Negro intervenors appealed. The Georgia Supreme Court affirmed, holding that the testator had a right to leave his property to a limited class and that charitable trusts are subject to the supervision of an equity court, which could appoint new trustees to avoid failure of the trust. *Held:*

1. Where private individuals or groups exercise powers or carry on functions governmental in nature, they become agencies or instrumentalities of the State and subject to the Fourteenth Amendment. P. 299.

2. Where the tradition of municipal control and maintenance had been perpetuated for many years, proof of the substitution of trustees is insufficient *per se* to divest the park of its public character. P. 301.

3. The services rendered by a park are municipal in nature and, under the circumstances of this case, the park is subject to the equal protection requirements of the Fourteenth Amendment. Pp. 301–302.

220 Ga. 280, 138 S. E. 2d 573, reversed.

Jack Greenberg argued the cause for petitioners. With him on the briefs were *James M. Nabrit III*, *Michael Meltsner*, *Donald L. Hollowell* and *Charles L. Black, Jr.*

C. Baxter Jones and *Frank C. Jones* argued the cause for respondents. With them on the brief were *A. O. B. Sparks, Jr.,* and *Willis B. Sparks III.*

Louis F. Claiborne, by special leave of Court, argued the cause for the United States, as *amicus curiae,* urging reversal. On the brief were *Solicitor General Marshall, Assistant Attorney General Doar, Ralph S. Spritzer, David Rubin* and *James L. Kelley.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

In 1911 United States Senator Augustus O. Bacon executed a will that devised to the Mayor and Council of the City of Macon, Georgia, a tract of land which, after the death of the Senator's wife and daughters, was to be used as "a park and pleasure ground" for white people only, the Senator stating in the will that while he had only the kindest feeling for the Negroes he was of the opinion that "in their social relations the two races (white and negro) should be forever separate." The will provided that the park should be under the control of a Board of Managers of seven persons, all of whom were to be white. The city kept the park segregated for some years but in time let Negroes use it, taking the position that the park was a public facility which it could not constitutionally manage and maintain on a segregated basis.[1]

Thereupon, individual members of the Board of Managers of the park brought this suit in a state court against the City of Macon and the trustees of certain residuary beneficiaries of Senator Bacon's estate, asking that the city be removed as trustee and that the court appoint new trustees, to whom title to the park would be transferred. The city answered, alleging it could not legally enforce racial segregation in the park. The other defendants admitted the allegation and requested that the city be removed as trustee.

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[1] *Watson* v. *Memphis,* 373 U. S. 526. And see *Mayor & City Council of Baltimore* v. *Dawson,* 350 U. S. 877 (beaches and bathhouses).

Several Negro citizens of Macon intervened, alleging that the racial limitation was contrary to the laws and public policy of the United States, and asking that the court refuse to appoint private trustees. Thereafter the city resigned as trustee and amended its answer accordingly. Moreover, other heirs of Senator Bacon intervened and they and the defendants other than the city asked for reversion of the trust property to the Bacon estate in the event that the prayer of the petition were denied.

The Georgia court accepted the resignation of the city as trustee and appointed three individuals as new trustees, finding it unnecessary to pass on the other claims of the heirs. On appeal by the Negro intervenors, the Supreme Court of Georgia affirmed, holding that Senator Bacon had the right to give and bequeath his property to a limited class, that charitable trusts are subject to supervision of a court of equity, and that the power to appoint new trustees so that the purpose of the trust would not fail was clear. 220 Ga. 280, 138 S. E. 2d 573. The case is here on a writ of certiorari. 380 U. S. 971.

There are two complementary principles to be reconciled in this case. One is the right of the individual to pick his own associates so as to express his preferences and dislikes, and to fashion his private life by joining such clubs and groups as he chooses. The other is the constitutional ban in the Equal Protection Clause of the Fourteenth Amendment against state-sponsored racial inequality, which of course bars a city from acting as trustee under a private will that serves the racial segregation cause. *Pennsylvania* v. *Board of Trusts,* 353 U. S.

230. A private golf club, however, restricted to either Negro or white membership is one expression of freedom of association. But a municipal golf course that serves only one race is state activity indicating a preference on a matter as to which the State must be neutral.[2] What is "private" action and what is "state" action is not always easy to determine. See *Burton* v. *Wilmington Parking Authority,* 365 U. S. 715. Conduct that is formally "private" may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action. The action of a city in serving as trustee of property under a private will serving the segregated cause is an obvious example. See *Pennsylvania* v. *Board of Trusts, supra.* A town may be privately owned and managed, but that does not necessarily allow the company to treat it as if it were wholly in the private sector. Thus we held in *Marsh* v. *Alabama,* 326 U. S. 501, that the exercise of constitutionally protected rights on the public streets of a company town could not be denied by the owner. A State is not justified, we said, in "permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties . . . ." *Id.,* at 509. We have also held that where a State delegates an aspect of the elective process to private groups, they become subject to the same restraints as the State. *Terry* v. *Adams,* 345 U. S. 461. That is to say, when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations.

Yet generalizations do not decide concrete cases. "Only by sifting facts and weighing circumstances"

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[2] *Holmes* v. *City of Atlanta,* 350 U. S. 879; *New Orleans Park Assn.* v. *Detiege,* 358 U. S. 54.

(*Burton* v. *Wilmington Parking Authority, supra,* at 722) can we determine whether the reach of the Fourteenth Amendment extends to a particular case. The range of governmental activities is broad and varied, and the fact that government has engaged in a particular activity does not necessarily mean that an individual entrepreneur or manager of the same kind of undertaking suffers the same constitutional inhibitions. While a State may not segregate public schools so as to exclude one or more religious groups, those sects may maintain their own parochial educational systems. *Pierce* v. *Society of Sisters,* 268 U. S. 510.

If a testator wanted to leave a school or center for the use of one race only and in no way implicated the State in the supervision, control, or management of that facility, we assume *arguendo* that no constitutional difficulty would be encountered.[3]

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[3] It is argued that this park was a product of Georgia's policy to allow charitable trusts of public facilities to be segregated. A Georgia statute permitted any person to grant a municipal corporation land in trust to the public use as a park on a racially segregated basis. Ga. Code Ann. § 69–504. And a companion measure authorized municipal corporations to accept such grants and to enforce the racial limitations. *Id.,* § 69–505. This policy, it is urged, had a "coercive effect" (*Lombard* v. *Louisiana,* 373 U. S. 267, 273) implicating Georgia in racial discrimination, for without that legislative pattern for segregation a testator would have had to travel an uncertain course to reach that end. Before § 69–504 was enacted in 1905, an attempt to establish a trust such as this would have faced numerous difficulties. The pre-1905 statutory law did not expressly include parks as a proper subject of charitable trusts, although it was specific in other regards. See Ga. Code § 4008 (1895). And Georgia's public parks were conceived of as "dedicated" commons with an easement in favor of the general public. See *Mayor & Council of Macon* v. *Franklin,* 12 Ga. 239. The concept of dedication meant that the property was to benefit the public as a whole. *Ford* v. *Harris,* 95 Ga. 97, 101, 22 S. E. 144, 145; *East Atlanta Land Co.* v. *Mower,* 138 Ga. 380, 388, 75 S. E. 418, 422. It would have

This park, however, is in a different posture. For years it was an integral part of the City of Macon's activities. From the pleadings we assume it was swept, manicured, watered, patrolled, and maintained by the city as a public facility for whites only, as well as granted tax exemption under Ga. Code Ann. § 92-201. The momentum it acquired as a public facility is certainly not dissipated *ipso facto* by the appointment of "private" trustees. So far as this record shows, there has been no change in municipal maintenance and concern over this facility. Whether these public characteristics will in time be dissipated is wholly conjectural. If the municipality remains entwined in the management or control of the park, it remains subject to the restraints of the Fourteenth Amendment just as the private utility in *Public Utilities Comm'n* v. *Pollak,* 343 U. S. 451, 462, remained subject to the Fifth Amendment because of the surveillance which federal agencies had over its affairs. We only hold that where the tradition of municipal control had become firmly established, we cannot take judicial notice that the mere substitution of trustees instantly transferred this park from the public to the private sector.

This conclusion is buttressed by the nature of the service rendered the community by a park. The service rendered even by a private park of this character is municipal in nature. It is open to every white person, there being no selective element other than race. Golf

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posed conceptual difficulties, to say the least, to dedicate land to the public as a whole, at the same time excluding the members of the Negro race. Cf. *Brown* v. *Gunn,* 75 Ga. 441, in which this point was disposed of only by finding that, on the particular facts of that case, there was no "dedication." We think it likely that it was the very difficulties discussed here that § 69-504 was intended to eliminate. We do not, however, reach the question whether the State facilitated, through this legislative action, the establishment of segregated parks.

clubs, social centers, luncheon clubs, schools such as Tuskegee was at least in origin,[4] and other like organizations in the private sector are often racially oriented. A park, on the other hand, is more like a fire department or police department that traditionally serves the community. Mass recreation through the use of parks is plainly in the public domain, *Watson* v. *Memphis,* 373 U. S. 526; and state courts that aid private parties to perform that public function on a segregated basis implicate the State in conduct proscribed by the Fourteenth Amendment. Like the streets of the company town in *Marsh* v. *Alabama, supra,* the elective process of *Terry* v. *Adams, supra,* and the transit system of *Public Utilities Comm'n* v. *Pollak, supra,* the predominant character and purpose of this park are municipal.

Under the circumstances of this case, we cannot but conclude that the public character of this park requires that it be treated as a public institution subject to the command of the Fourteenth Amendment, regardless of who now has title under state law. We may fairly assume that had the Georgia courts been of the view that even in private hands the park may not be operated for the public on a segregated basis, the resignation would not have been approved and private trustees appointed. We put the matter that way because on this record we cannot say that the transfer of title *per se* disentangled the park from segregation under the municipal regime that long controlled it.

Since the judgment below gives effect to that purpose, it must be and is *Reversed.*

MR. JUSTICE WHITE.

As MR. JUSTICE BLACK emphasizes, this case comes to us in the very narrow context of a state court judgment accepting the resignation of a trustee and appointing successor trustees. The lower court judgment does not enjoin the new trustees to comply with the racial restriction in the trust, and there is therefore not presented for decision the question whether, should the trustees fail to exclude Negroes from the park, state judicial enforcement of the racial restriction would constitute discriminatory state action forbidden by the Equal Protection Clause of the Fourteenth Amendment. See *Bell* v. *Maryland,* 378 U. S. 226, 328–331 (dissenting opinion). But we do have properly before us, in my opinion, the question of whether the Fourteenth Amendment prohibits the new trustees from voluntarily excluding Negroes. This is so because decision of the state law questions in this case was not independent of that federal question. The city's resignation, its acceptance by the state courts, and the appointment of new trustees were all based on the premise that the city could not, but private trustees could, obey the racial restriction in the trust without violation of the Federal Constitution. If that premise was incorrect, this Court should vacate the judgment below and remand for further consideration of the state law issues free from the compulsion of an erroneous view of federal law. *Missouri ex rel. Southern R. Co.* v. *Mayfield,* 340 U. S. 1, 5; *Minnesota* v. *National Tea Co.,* 309 U. S. 551; *State Tax Comm'n* v. *Van Cott,* 306 U. S. 511.

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[4] Ala. Laws 1880-1881, pp. 395-396; Ala. Laws, 1882-1883, pp. 392-393.

That the Fourteenth Amendment prohibits operation of the park on a segregated basis so long as the city is trustee is of course not disputed. See cases cited by the majority, *ante,* n. 1. Whether the successor trustees may themselves operate the park on a segregated basis is the question. The majority holds that they may not. I agree, but for different reasons.

To a large extent the majority grounds its conclusion that exclusion of Negroes from the park after the change in trustees would be state action and thus violative of the Fourteenth Amendment on the existence of prior municipal involvement in the operation of the park.

> "The momentum [the park] acquired as a public facility is certainly not dissipated *ipso facto* by the appointment of 'private' trustees. So far as this record shows, there has been no change in municipal maintenance and concern over this facility. Whether these public characteristics will in time be dissipated is wholly conjectural. . . . We only hold that where the tradition of municipal control had become firmly established, we cannot take judicial notice that the mere substitution of trustees instantly transferred this park from the public to the private sector." *Ante,* at 301.

It is equally evident that the record does not show continued involvement of the city in the operation of the park—the record is silent on this point. On the contrary, the city's interest would seem to lead it to cut all ties with the operation of the park. It must be as clear to the city as to this Court that if the city remains "entwined in the management or control of the park, it remains subject to the restraints of the Fourteenth Amendment," *ante,* p. 301; and should segregation in the park be barred, the residuary beneficiaries would undoubtedly press their claim that failure of the trust purpose expressed in the racial restriction results in reversion of the park property. It seems unlikely that the city would act so as unnecessarily to jeopardize the continued existence of this centrally located park, which comprises about 100 acres and is one of the city's largest parks.

That the city's own interest might lead it to extricate itself at once from operation of the park does not, of course, necessarily mean that it has done so; and I am no more inclined than the majority to resolve this question by conjecture. I refer to possible inferences from the city's self-interest solely to emphasize that the record affords absolutely no basis for inferring continued involvement of the city in the management and control of the park. What the majority has done is to raise a presumption of one fact by showing the absence of proof of the converse. To postulate in this manner that the city's involvement has not been dissipated is simply a disguised form of conjecture and, I submit, is an insufficient basis for decision of this case.

I would nevertheless hold that the racial condition in the trust may not be given effect by the new trustees because, in my view, it is incurably tainted by discriminatory state legislation validating such a condition under state law. The state legislation to which I refer is §§ 69-504 and 69-505 of the Georgia Code, which were adopted in 1905, just six years before Senator Bacon's will was executed. Sections 69-504 and 69-505 make lawful charitable trusts "dedicated in perpetuity to the public use as a park, pleasure ground, or for other public purpose" and provide that "the use of said park, pleasure ground, or other property so conveyed to said municipality [may] be limited to the white race only, or to white women and children only, or to the colored race only, or to colored women and children only, or to any other race, or to the women and children of any other race only . . . ."[1]

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[1] "69-504. *Gifts for public parks or pleasure grounds.*—Any person may, by appropriate conveyance, devise, give, or grant to any municipal corporation of this State, in fee simple or in trust, or to other persons as trustees, lands by said conveyance dedicated in perpetuity to the public use as a park, pleasure ground, or for other public purpose, and in said conveyance, by appropriate limitations and conditions, provide that the use of said park, pleasure ground, or other property so conveyed to said municipality shall be limited to the white race only, or to white women and children only, or to the colored race only, or to colored women and children only, or to

As this legislation does not compel a trust settlor to condition his grant upon use only by a racially designated class, the State cannot be said to have directly coerced private discrimination. Nevertheless, if the validity of the racial condition in Senator Bacon's trust would have been in doubt but for the 1905 statute and if the statute removed such doubt only for racial restrictions, leaving the validity of nonracial restrictions still in question, the absence of coercive language in the legislation would not prevent application of the Fourteenth Amendment. For such a statute would depart from a policy of strict neutrality in matters of private discrimination by enlisting the State's assistance only in aid of racial discrimination and would so involve the State in the private choice as to convert the infected private discrimination into state action subject to the Fourteenth Amendment. Compare *Robinson* v. *Florida,* 378 U. S. 153; *Lombard* v. *Louisiana,* 373 U. S. 267; *Peterson* v. *City of Greenville,* 373 U. S. 244. Although there are no Georgia decisions directly on the point and the question is therefore not free from doubt, the available authorities

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any other race, or to the women and children of any other race only, that may be designated by said devisor or grantor; and any person may also, by such conveyance, devise, give, or grant in perpetuity to such corporations or persons other property, real or personal, for the development, improvement, and maintenance of said property.

"69–505. *Municipality authorized to accept.*—Any municipal corporation, or other persons natural or artificial, as trustees, to whom such devise, gift, or grant is made, may accept the same in behalf of and for the benefit of the class of persons named in the conveyance, and for their exclusive use and enjoyment; with the right to the municipality or trustees to improve, embellish, and ornament the land so granted as a public park, or for other public use as herein specified, and every municipal corporation to which such conveyance shall be made shall have power, by appropriate police provision, to protect the class of persons for whose benefit the devise or grant is made, in the exclusive used [*sic*] and enjoyment thereof." Ga. Code Ann. §§ 69–504 and 69–505 (1957).

have led me to conclude that §§ 69-504 and 69-505 did involve the State in the private choice by favoring private racial discrimination over private discrimination based on grounds other than race.

Apart from §§ 69-504 and 69-505, the Georgia statute governing the determination of permissible objects of charitable trusts is § 108-203.[2] This statute "almost copies the statute of 43d Elizabeth," *Newson* v. *Starke*, 46 Ga. 88, 92 (1872), and has the effect of fully adopting in Georgia the common law of charities, *Jones* v. *Habersham*, 107 U. S. 174, 180. We may therefore expect general charitable trust principles to be as fully applicable in Georgia as elsewhere in the several States. Under such principles, there is grave doubt concerning whether a charitable trust for a park could be limited to the use of less than the whole public.

In the leading case of *Commissioners for Special Purposes of Income Tax* v. *Pemsel*, [1891] A. C. 531, 583, Lord Macnaghten established the classification of charitable trusts that, with some modifications, has since prevailed:

> " 'Charity' in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the ad-

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[2] "108-203. *Subjects of charity.*—The following subjects are proper matters of charity for the jurisdiction of equity:

"1. Relief of aged, impotent, diseased, or poor people.

"2. Every educational purpose.

"3. Religious instruction or worship.

"4. Construction or repair of public works, or highways, or other public conveniences.

"5. Promotion of any craft or persons engaging therein.

"6. Redemption or relief of prisoners or captives.

"7. Improvement or repair of cemeteries or tombstones.

"8. Other similar subjects, having for their object the relief of human suffering or the promotion of human civilization." Ga. Code Ann. § 108-203 (1959).

> vancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads."

See also Restatement (Second), Trusts § 368 (1959). A more general test of what is charitable is whether the accomplishment of the trust purpose "is of such social interest to the community as to justify permitting property to be devoted to the purpose in perpetuity." IV Scott on Trusts § 368, at 2629–2630 (2d ed. 1956). The first three categories identified by Lord Macnaghten designate trust purposes that have long been recognized as beneficial to the community as a whole—whether or not immediate benefit is restricted to a relatively small group—and that therefore satisfy the general test stated by Professor Scott. See Restatement (Second), Trusts § 374, comment *a* (1959). But the present trust falls under the fourth category and can therefore be sustained as charitable only because the generality of user beneficiaries establishes that it is beneficial to the community. Otherwise a trust to establish a country club for the use of the residents of the wealthiest part of town would be charitable. Professor Scott states this principle as follows:

> "As we have seen, a trust to promote the happiness or well-being of members of the community is charitable, although it is not a trust to relieve poverty, advance education, promote religion or protect health. In such a case, however, *the trust must be for the benefit of the members of the community generally* and not merely for the benefit of a class of persons." IV Scott on Trusts § 375.2, at 2715 (2d ed. 1956). (Emphasis added.)

Accord, *Trustees of New Castle Common* v. *Megginson,* 1 Boyce 361, 376, 77 A. 565, 571 (Sup. Ct. Del. 1910) (trust for town common was charitable; "[i]t is public, because it relates to all the inhabitants of a particular community and not to any classification of such inhabitants, or to any group thereof separately from the other inhabitants by any distinction of race, creed, social rank, wealth, poverty, occupation, or business . . ."); Restatement, Trusts § 375, comments *a* and *c* (1935); Restatement (Second), Trusts § 375, comment *a* (1959); see also Bogert on Trusts § 378 (2d ed. 1964).[3] Apart from the present case, no Georgia cases dealing with trusts for general community purposes have been found, see Smith, The Validity of Charitable Gifts in Georgia, 1 Ga. B. J. 16, 26–27 (Feb. 1939), but the available Georgia authorities are consistent with the rule enunciated by Scott. Compare *Bramblett* v. *Trust Co. of Georgia*, 182 Ga. 87, 185 S. E. 72 (1936) (trust to establish "home for gentlewomen" not charitable), with *Houston* v. *Mills Memorial Home*, 202 Ga. 540, 43 S. E. 2d 680 (1947) (trust for Negro old folks' home is charitable).[4] On the whole, therefore, I conclude that prior to the 1905 legislation it would have been extremely doubtful whether § 108–203 authorized a trust for park purposes when a portion of the public was to be excluded from the park.

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[3] This precise question had been mooted in England a few years before the 1905 Georgia enactment in the case of *In re Christchurch Inclosure Act,* 38 Ch. D. 520 (1888), aff'd, [1893] A. C. 1, and it appears the English rule may differ from the American rule. The Christchurch Inclosure Act gave tenants in certain cottages the right in a designated common to cut turf for fuel. In the case before the court, it was clear the act had to be given effect in some manner, but the court expressed great difficulty in giving it effect as creating a charitable trust. "For, although the occupiers of these cottages may have been, and perhaps were, poor people, the trust is not for the poor occupiers, but for all the then and future occupiers, whether poor or not. Moreover, the trust is not for the inhabitants of a parish or district, but only for some of such persons." *Id.,* at 530. Nevertheless, the court felt bound to hold such a trust was charitable on the authority of a dictum by Lord Selborne in *Goodman* v. *Mayor of Saltash,* 7 App. Cas. 633, 642 (1882) (trust for a fishery for the use of all "free inhabitants of ancient tenements" held charitable), that "[a] gift subject to a condition or trust for the benefit of the inhabitants of a parish or town, or of any particular class of such inhabitants, is (as I understand the law) a charitable trust . . . ." Lord Blackburn dissented in *Goodman* v. *Mayor of Saltash,* saying that "though there are many cases to the effect that a trust for public purposes, not confined to the poor, may be considered charitable for many purposes, I do not know of any that say that such a trust as is now supposed would be taken out of the rule against perpetuities . . . ." *Id.,* at 662. No doubt Lord Selborne's view of what constituted a trust for the benefit of the public generally was colored by feudal traditions and the long history of royal charters to the burghers, or "free inhabitants" of a town (in

Sections 69–504 and 69–505 clearly permit exclusion of a portion of the public if such exclusion is on racial grounds. At the same time, those sections appear to make nonracial restrictions on the user of a park created by trust even more doubtful. Section 69–504 authorizes the conveyance of land "dedicated in perpetuity to the public use as a park" and also provides that such a conveyance may limit user on racial grounds. The natural construction of this provision would be that it authorizes a trust only for the use of the whole public

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fact, the trust in *Goodman* v. *Mayor of Saltash* was a fictional one created by supposing the prior existence of such a charter, now lost), while the American rule enunciated by Scott is in keeping with the American democratic tradition, which in turn is reflected by the Georgia cases regarding dedication of land to public use discussed by the majority, *ante*, at 300–301, n. 3.

[4] The trust in *Mills Memorial Home* was specifically recognized as charitable by § 108–203 (1) ("Relief of aged, impotent, diseased, or poor people"), see note 2, *supra*, while the trust in *Bramblett* would be classifiable as one to promote the happiness or well-being of members of the community at large and would thus be tested by the standard of generality stated by Professor Scott.

or for the use of a racially designated subpart of the public, but not for the use of some other portion of the public such as men only or Irish persons only. Such an interpretation follows from the maxim *expressio unius est exclusio alterius* and from the dedication cases to which the majority refers, *ante*, at 300–301, n. 3, which indicate that the expression "dedicated in perpetuity to the public use as a park" means dedication to the public as a whole and not some portion of the public. See also *Western Union Telegraph Co.* v. *Georgia R. & Banking Co.*, 227 F. 276, 285 (D. C. S. D. Ga. 1915). (" 'There can be no dedication, strictly speaking, to private uses, nor even to uses public in their nature, but the enjoyment of which is restricted to a limited part of the public.' ") One commentator has suggested that § 69–504 was intended to expand clause 4 of § 108–203, see note 2, *supra, i. e.*, "to enlarge 'public works' or 'public conveniences' to include public parks or pleasure grounds . . . ." Smith, The Validity of Charitable Gifts in Georgia, 1 Ga. B. J. 16, 27 (Feb. 1939). On that assumption, the sole authority for holding gifts in trust for park purposes to be charitable would be § 69–504, and that section clearly makes nonracial restrictions on use of such parks more doubtful than racial restrictions. Even if § 69–504 is regarded as a clarification of prior law, rather than an addition to it, it has the same effect of casting doubt on the validity of nonracial restrictions.

This case must accordingly be viewed as one where the State has forbidden all private discrimination except racial discrimination. As a result, "the State through its regulations has become involved to such a significant extent" in bringing about the discriminatory provision in Senator Bacon's trust that the racial restriction "must be held to reflect . . . state policy and therefore to violate the Fourteenth Amendment." *Robinson* v. *Florida*, 378 U. S. 153, 156–157. For the reasons stated, I would vacate the judgment of the Georgia court and remand the case for further proceedings.

MR. JUSTICE BLACK, dissenting.

I find nothing in the United States Constitution that compels any city or other state subdivision to hold title to property it does not want or to act as trustee under a will when it chooses not to do so. And I had supposed until now that the narrow question of whether a city could resign such a trusteeship and whether a state court could appoint successor trustees depended entirely on state law. Here, however, the Court assumes that federal power exists to reverse the Supreme Court of Georgia for affirming a Georgia trial court's decree which, as the State Supreme Court held, did only these "two things: (1) Accepted the resignation of the City of Macon as trustee of Baconsfield; and (2) appointed new trustees." 220 Ga. 280, 284; 138 S. E. 2d 573, 576.

The State Supreme Court's interpretation of the scope and effect of this Georgia decree should be binding upon us unless the State Supreme Court has somehow lost its power to control and limit the scope and effect of Georgia trial court decrees relating to Georgia wills creating Georgia trusts of Georgia property. A holding that ignores this state power would be so destructive of our state judicial systems that it could find no support, I think, in our Federal Constitution or in any of this Court's prior decisions. For myself, I therefore accept the decision of the Georgia Supreme Court as holding only what it declared it held, namely, that the trial court committed no error under Georgia law in accepting the City of Macon's resignation as trustee and in appointing successor trustees to execute the Bacon trust.

I am not sure that the Court is passing at all on the only two questions the Georgia Supreme Court decided in approving the city's resignation as trustee and the appointment of successors. If the Court is holding that a State is without these powers, it is certainly a drastic departure from settled constitutional doctrine and a vastly important one which, I cannot refrain from saying, deserves a clearer explication than it is given. Ambiguity cannot, however, conceal the revolutionary nature of such a holding, if this is the Court's holding, nor successfully obscure the tremendous lopping off of power heretofore uniformly conceded by all to belong to the States. This ambiguous and confusing disposition of such highly important questions is particularly disturbing to me because the Court's discussion of the constitutional status of the park comes in the nature of an advisory opinion on federal constitutional questions the Georgia Supreme Court did not decide. Consequently, for all the foregoing reasons and particularly since the Georgia courts decided no federal constitutional question, I agree with my Brother HARLAN that the writ of certiorari should have been dismissed as improvidently granted.

Questions of this Court's jurisdiction would be different, of course, if either the mere resignation or appointment of trustees under a will was prohibited by some federal constitutional provision. But there is none. The Court implies, however, that the city's resignation and the state court's appointment of new trustees amounted to "state-sponsored racial inequality," which, of course, if correct, would present a federal constitutional question. This suggestion rests on a further implication by the Court that the Georgia court's decree would result in the operation of Baconsfield Park on a racially segregated basis. The record here, for several reasons, can support no such implications: (1) the State Supreme Court specifically limited the effect of the decree it affirmed to approval of the city's resignation as trustee and the appointment of new ones; (2) the new trustees were not directed to operate the park on a discriminatory basis; and (3) there is no indication that they have done so. Furthermore, where a valid law makes a certain use of property held in trust illegal, responsibility for its illegal use cannot be escaped by putting it in the hands of new trustees. Cf., *e. g., Mormon Church* v. *United States,* 136 U. S. 1, 47–48.

The ambiguous language used by the Court even casts doubt upon Georgia's power to hold that the trust property here can revert to the heirs of Senator Bacon if the conditions upon which he created the trust should become impossible to carry out. The heirs of Senator Bacon raised the issue of reversion below, but neither court reached it. So far as I have been able to find, the power of a State to decide such a question has been taken for granted in every prior opinion this Court has ever written touching this subject. I believe that Georgia's complete power to decide this question is so clear that no doubt should be cast on it as I think the Court's opinion does. But if this Court is to exercise jurisdiction in this case and hold, despite the fact that the state court's decree did not adjudicate any such question, that the new successor trustees cannot constitutionally operate the park in accordance with Senator Bacon's will, then I think that the Court should explicitly state that the question of reversion to his heirs is controlled by state law and remand the case to the Georgia Supreme Court to decide that question.

Nothing that I have said is to be taken as implying that Baconsfield Park could at this time be operated by successor trustees on a racially discriminatory basis. Questions of equal protection of all people without discrimination on account of color are of paramount importance in this Government dedicated to equal justice for all. We can accord that esteemed principle the respect it is due, however, without distorting the constitutional structure of our Government by taking away from the States that which is their due.

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART joins, dissenting.

This decision, in my opinion, is more the product of human impulses, which I fully share, than of solid constitutional thinking. It is made at the sacrifice of long-established and still wise procedural and substantive constitutional principle. I must respectfully dissent.

I.

In my view the writ should be dismissed as improvidently granted because the far-reaching constitutional question tendered is not presented by this record with sufficient clarity to require or justify its adjudication, assuming that the question is presented at all.

In the posture in which this case reached the state courts it required of them no more than approval of the city's resignation as trustee under Senator Bacon's will and the appointment of successor trustees. Neither of these issues of course would in itself present a federal question. While I am inclined to agree with my Brother BLACK that this is all the state courts decided, I think it must be recognized that the record is not wholly free from ambiguity on this score. Even so, the writ should be dismissed. To infer from the Georgia Supreme Court's opinion, as the majority here does, a further holding that the new trustees are entitled to operate Baconsfield on a racially restricted basis, is to stretch for a constitutional issue. This plainly contravenes the established rule that this Court will not reach constitutional questions if their decision can reasonably be avoided. *Peters* v. *Hobby,* 349 U. S. 331; *United States* v. *Rumely,* 345 U. S. 41; *Charles River Bridge* v. *Warren Bridge,* 11 Pet. 420, 553. Application of that doctrine is especially called for here where decision should require precise knowledge of the factual details and nuances that only time and a complete record can bring into focus. Dismissal of the writ should thus follow.

II.

On the merits, which I reach only because the Court has done so, I do not think that the Fourteenth Amendment permits this Court in effect to frustrate the terms of Senator Bacon's will, now that the City of Macon is no longer connected, so far as the record shows, with the administration of Baconsfield. If the majority is in doubt that such is the case, it should remand for findings on that issue and not reverse.

The Equal Protection Clause reaches only discriminations that are the product of capricious state action; it does not touch discriminations whose origins and effectuation arise solely out of individual predilections, prejudices, and acts. *Civil Rights Cases,* 109 U. S. 3. So far as the Fourteenth Amendment is concerned the curtailing of private discriminatory acts, to the extent they may be forbidden at all, is a matter that is left to the States acting within the permissible range of their police power.

From all that now appears, this is a case of "private discrimination." Baconsfield had its origin not in any significant governmental action [1] or on any public land but rather in the personal social philosophy of Senator Bacon and on property owned by him. The City of Macon's acceptance and, until recent years, its carrying out of the trusteeship were both entirely legitimate, and indeed in accord with the prevailing *mores* of the times. When continuance of its trusteeship became incompatible with later changes in constitutional doctrine, the city first undertook to disregard the racial restrictions imposed by the will on the use of the park, and then when that action was appropriately challenged, resigned as trustee. The state courts, obedient to federal commands, *Pennsylvania* v. *Board of Trusts,* 353 U. S. 230, have accepted the resignation of the city, and, to prevent failure of the trust under their own laws, have appointed new trustees. I can see nothing in this straightforward

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[1] The majority disclaims reliance on the early Georgia charitable trust statutes authorizing the establishment of racially restricted parks and permitting a city to act as trustee under such a trust. My Brother WHITE, however, finds that the mere existence of those statutes, enacted in 1905, "incurably taint[s]" the racial conditions of Senator Bacon's will (*ante*, p. 305). For several reasons that thesis seems to me to fall short. First, it is by no means clear that

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Georgia common law would not have permitted user restrictions on such a park in trust, so that the statute was but declaratory of existing law *pro tanto.* See, *e. g., Houston* v. *Mills Memorial Home,* 202 Ga. 540, 43 S. E. 2d 680 (permitting trust for home for Negro aged). Thus even on my Brother WHITE's premise that a State in allowing discrimination may not discriminate among possible user restrictions, the proper course would be to remand to the Georgia courts to determine whether user-restricted trusts such as Senator Bacon's were in any event valid under the state common law. Second, in order to find an "incurable taint" of the racial conditions rather than an arguable claim turning on state common law, it is apparently suggested that the state statutes invalidly "removed . . . doubt only for racial restrictions" (*ante,* p. 306) and by this clarification improperly encouraged Senator Bacon to discriminate. There is, however, absolutely no indication whatever in the record that Senator Bacon would have acted otherwise but for the statute, a gap in reasoning that cannot be obscured by general discussion of state "involvement" or "infection." Third, it could hardly be argued that the statute in question was unconstitutional when passed, in light of the then-prevailing constitutional doctrine; that being so, it is difficult to perceive how it can now be taken to have tainted Senator Bacon's will at the time he made his irrevocable choice.

train of events which justifies finding "state action" of the kind necessary to bring the Fourteenth Amendment into play.

The first ground for the majority's state action holding rests on nothing but an assumption and a conjecture. The assumption is that the city itself maintained Baconsfield in the past. The conjecture is that it will continue to be connected with the administration of the park in the future. The only underpinning for the assumption is the circumstance that over the years Baconsfield has geographically become an adjunct to the city's park system and the admitted fact that until the present proceeding, title to it was vested in the city as trustee. The only predicate for the majority's conjecture as to the future is the failure of the record to show the contrary.

If speculation is the test, the record more readily supports contrary inferences. Papers before us indicate that Senator Bacon left other property in trust precisely in order to maintain Baconsfield.[2] Why should it be assumed that these resources were not used in the past for that purpose, still less that the new trustees, now faced with a challenge as to their right to effectuate the terms of Senator Bacon's trust, will not keep Baconsfield privately maintained in all respects? Further, the city's and state courts' readiness to sever ties between the city and park in derogation of the will, let alone the city's earlier operation of the park on a nonsegregated basis despite the terms of the will, strongly indicates that they will not flinch from completing the separation of park and state if any ties remain to implicate the Fourteenth Amendment.

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[2] See R. 20, 22, for provisions of Senator Bacon's will allotting property for "the management, improvement and preservation" of the park.

For me this facet of the majority's opinion affords a wholly unacceptable basis for imputing unconstitutional state action, resting as it does on pure surmise and conjecture, and implausible ones at that.[3]

III.

Quite evidently uneasy with its first ground of decision, the majority advances another which ultimately emerges as the real holding. This ground derives from what is asserted to be the "public character" (*ante,* p. 302) of Baconsfield and the "municipal . . . nature" of its services (*ante,* p. 301). Here it is not suggested that Baconsfield will use public property or funds, be managed by the city, enjoy an exclusive franchise, or even operate under continuing supervision of a public regulatory agency. State action is inherent in the operation of Baconsfield quite independently of any such factors, so it seems to be said, because a privately operated park whose only criterion for exclusion is racial is within the "public domain" (*ante,* p. 302).

Except for one case which will be found to be a shaky precedent, the cases cited by the majority do not support this novel state action theory. *Public Utilities*

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[3] Twice in its opinion the majority intimates it might reach a different conclusion on the city's involvement if it had a fully developed record before it. At p. 301, *ante,* the Court says, "We only hold that where the tradition of municipal control had become firmly established, we cannot take judicial notice that the mere substitution of trustees instantly transferred this park from the public to the private sector." And in concluding at p. 302, *ante,* the opinion reads: "We put the matter that way because on this record we cannot say that the transfer of title *per se* disentangled the park from segregation under the municipal regime that long controlled it." These cautions seem to reinforce the point made at the outset of this dissent that the Court should have refused to adjudicate the constitutional issue on this cloudy record. See *Rescue Army* v. *Municipal Court,* 331 U. S. 549.

Comm'n v. *Pollak,* 343 U. S. 451, applied due process standards, limited like equal protection standards to instances involving state action, to certain action of a private citywide transit company. State action was explicitly premised on the close legal regulation of the company by the public utilities commission and the commission's approval of the particular action under attack. The conclusion might alternatively have rested on the near-exclusive legal monopoly enjoyed by the company, 343 U. S., at 454, n. 1, but in all events nothing was rested on any "public function" theory. ***Watson*** v. ***Memphis,*** 373 U. S. 526, ordering speedy desegregation of parks in that city, concerned recreation facilities concededly owned or managed by the city government. See 303 F. 2d 863, 864–865.[4] The only Fourteenth Amendment case[5] finding state action in the "public function" performed by a technically private institution is ***Marsh*** v. ***Alabama,*** 326 U. S. 501, holding that a company-owned town of over 1,500 residents and effectively integrated into the surrounding area could not suppress free speech on its streets in disregard of constitutional safeguards.

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[4] The majority's language directly following its *Watson* citation (*ante,* p. 302)—"and state courts that aid private parties to perform that public function [mass recreation through the use of parks] on a segregated basis implicate the State in conduct proscribed by the Fourteenth Amendment"—quite evidently is oblique reliance on *Shelley* v. *Kraemer,* 334 U. S. 1, which the majority does not even cite. Whatever may be the basis of that inscrutable decision, certainly nothing in it purports to rest on anything resembling the "public function" theory.

[5] In *Terry* v. *Adams,* 345 U. S. 461, cited by the Court, none of the three prevailing opinions garnered a majority, and some commentators have simply concluded that the state action requirement was read out of the Fifteenth Amendment on that occasion. Lewis, The Meaning of State Action, 60 Col. L. Rev. 1083, 1094 (1960); Note, The Strange Career of "State Action" Under the Fifteenth Amendment, 74 Yale L. J. 1448, 1456–1459 (1965).

While no stronger case for the "public function" theory can be imagined, the majority opinion won only five of the eight Justices participating, one of whom also concurred separately, and three spoke out in dissent. The doctrine of that case has not since been the basis of other decisions in this Court and certainly it has not been extended. On the contrary, several years after the decision this Court declined to review two New York cases which in turn held *Marsh* inapplicable to a privately operated residential community of apartment buildings housing 35,000 residents, *Watchtower Bible & Tract Soc'y* v. *Metropolitan Life Ins. Co.*, 297 N. Y. 339, 79 N. E. 2d 433, certiorari denied, 335 U. S. 886, and to a privately owned housing development of 25,000 people alleged to discriminate on racial grounds, *Dorsey* v. *Stuyvesant Town Corp.*, 299 N. Y. 512, 87 N. E. 2d 541, certiorari denied, 339 U. S. 981. See also *Hall* v. *Virginia*, 335 U. S. 875, dismissing the appeal in 188 Va. 72, 49 S. E. 2d 369.

More serious than the absence of any firm doctrinal support for this theory of state action are its potentialities for the future. Its failing as a principle of decision in the realm of Fourteenth Amendment concerns can be shown by comparing—among other examples that might be drawn from the still unfolding sweep of governmental functions—the "public function" of privately established schools with that of privately owned parks. Like parks, the purpose schools serve is important to the public. Like parks, private control exists, but there is also a very strong tradition of public control in this field. Like parks, schools may be available to almost anyone of one race or religion but to no others. Like parks, there are normally alternatives for those shut out but there may also be inconveniences and disadvantages caused by the restriction. Like parks, the extent of school intimacy varies greatly depending on the size and character of the institution.

For all the resemblance, the majority assumes that its decision leaves unaffected the traditional view that the Fourteenth Amendment does not compel private schools to adapt their admission policies to its requirements, but that such matters are left to the States acting within constitutional bounds. I find it difficult, however, to avoid the conclusion that this decision opens the door to reversal of these basic constitutional concepts, and, at least in logic, jeopardizes the existence of denominationally restricted schools while making of every college entrance rejection letter a potential Fourteenth Amendment question.

While this process of analogy might be spun out to reach privately owned orphanages, libraries, garbage collection companies, detective agencies, and a host of other functions commonly regarded as nongovernmental though paralleling fields of governmental activity, the example of schools is, I think, sufficient to indicate the pervasive potentialities of this "public function" theory of state action. It substitutes for the comparatively clear and concrete tests of state action a catchphrase approach as vague and amorphous as it is far-reaching. It dispenses with the sound and careful principles of past decisions in this realm. And it carries the seeds of transferring to federal authority vast areas of concern whose regulation has wisely been left by the Constitution to the States.

KATCHEN *v.* LANDY, TRUSTEE IN BANKRUPTCY.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

No. 28. Argued November 8, 1965.—Decided January 17, 1966.

Petitioner, a corporate officer, was an accommodation maker on notes of the corporation to two banks. After the corporation suffered a serious fire, its funds and collections were placed in a trust account under petitioner's control. Petitioner made payments on the notes from this account within four months of the bankruptcy of the corporation. Two claims were filed by petitioner in the bankruptcy proceeding, one for rent due him and one for a payment on one of the notes from his personal funds. The trustee asserted that the payments from the trust fund to the banks were voidable preferences and demanded judgment for the amount of the preferences. The referee overruled petitioner's objection to his summary jurisdiction and rendered judgment for the trustee on the preferences. The District Court sustained the referee and the Court of Appeals affirmed the judgment for the amount of the preferences. *Held:* A bankruptcy court has summary jurisdiction to order the surrender of voidable preferences asserted and proved by the trustee in response to a claim filed by the creditor who received the preferences. Pp. 327–340.

(a) While the Bankruptcy Act does not expressly confer summary jurisdiction to order claimants to surrender preferences, the scope of summary proceedings is determined by consideration of the structure and purpose of the Act as a whole and the particular provisions of the Act in question. P. 328.

(b) Summary disposition is one of the means chosen by the Congress to effectuate its purpose of securing prompt settlement of bankrupt estates. Pp. 328–329.

(c) The basically important power granted by § 2a (2) of the Act to "allow," "disallow" and "reconsider" claims is to be exercised in summary proceedings and not by the slower and more expensive process of a plenary suit. Pp. 329–330.

(d) The trustee's objections under § 57g of the Act, which forbids allowance of a claim to a creditor who has received preferences "void or voidable under this title" without surrender of the preferences, is part of the allowance process and is subject to summary adjudication by a bankruptcy court. Pp. 330–331.

(e) Section 60 of the Act, which deals with preferences and their voidability and confers concurrent jurisdiction on state courts and federal bankruptcy courts to entertain plenary suits to recover preferences, applies only "where plenary suits are necessary" and thus contemplates nonplenary recovery proceedings. P. 331.

(f) Since summary jurisdiction is available to determine the issue of preference absent a demand for surrender of the preference, it is also available to order return of the preference. This follows because a bankruptcy court, in passing on a trustee's § 57g objection, must determine the amount of preference, if any, so as to ascertain whether the claimant, should he return the preference, has satisfied the condition imposed by § 57g on allowance of the claim. Pp. 333–334.

(g) When a bankruptcy court has dealt with the preference issue under its equity power nothing remains for adjudication in a plenary suit, as the normal rules of *res judicata* and collateral estoppel apply. P. 334.

(h) Although petitioner might be entitled to a jury trial on the preference issue if he presented no claim in the bankruptcy proceeding and awaited plenary suit by the trustee, he is not so entitled when the issue arises as part of the processing of claims in bankruptcy proceedings, triable in equity. Pp. 336–337.

(i) The doctrine of *Beacon Theatres* v. *Westover,* 359 U. S. 500, and *Dairy Queen* v. *Wood,* 369 U. S. 469, that "where both legal and equitable issues are presented in a single case, 'only under the most imperative circumstances . . . can the right to a jury trial of legal issues be lost through prior determination of equitable claims,' " is not applicable here where there is a specific statutory scheme providing for the prompt trial of disputed claims without a jury. Pp. 338–340.

336 F. 2d 535, affirmed.

Fred M. Winner argued the cause for petitioner. With him on the briefs was *Warren O. Martin.*

George Louis Creamer argued the cause for respondent. With him on the brief was *Robert B. Rottman.*

MR. JUSTICE WHITE delivered the opinion of the Court.

The disputed issue here is whether a bankruptcy court has summary jurisdiction to order the surrender of voidable preferences asserted and proved by the trustee in response to a claim filed by the creditor who received the preferences. The Court of Appeals held that the bankruptcy court had such summary jurisdiction. 336 F. 2d 535. We affirm.

The corporate bankrupt began business on April 21, 1960, and borrowed $50,000 from two local banks. Petitioner, then an officer of the company, was an accommodation maker on the two corporate notes delivered to the banks. After the corporate bankrupt in this case suffered a disastrous fire, its funds and collections were placed in a "trust account" under the sole control of petitioner. From this account petitioner made two payments on one of the company notes on which he was an accommodation maker and one payment on the other. Bankruptcy followed within four months of these payments. Petitioner filed two claims in the proceeding, one for rent due him from the bankrupt and one for a payment on one of the notes made from his personal funds. The trustee responded with a petition asserting that the payments from the trust fund to the banks were voidable preferences and demanding judgment for the amount of the preferences along with the amount of an unpaid stock subscription owed to the corporation by petitioner. Petitioner's objection to the summary jurisdiction of the referee was overruled, and judgment was rendered for the trustee on both the preferences and the stock subscription. Petitioner's claims were to be allowed only when and if the judgment was satisfied. The District Court sustained the referee. A divided Court of Appeals, sitting *en banc,* after reconsidering *Inter-State National Bank of Kansas City* v. *Luther,* 221 F. 2d

382 (C. A. 10th Cir. 1955), cert. dismissed under Rule 60, 350 U. S. 944, adhered to its pronouncements in that case, affirmed the judgment for the amount of the voidable preferences but reversed the judgment for the amount of the stock subscription. The trustee did not seek review here of the adverse decision on the stock subscription. We granted certiorari on the creditor's petition because of the diversity of views among the Courts of Appeals on the issue involved[1] and the importance of the question in the administration of the bankruptcy laws. 380 U. S. 971.

The crux of the dispute here concerns the mode of procedure for trying out the preference issue. The bankruptcy courts are expressly invested by statute with original jurisdiction to conduct proceedings under the Bankruptcy Act.[2] These courts are essentially courts of equity, *Local Loan Co.* v. *Hunt,* 292 U. S. 234, 240; *Pepper* v. *Litton,* 308 U. S. 295, 304, and they characteristically proceed in summary fashion to deal with the assets of the bankrupt they are administering. The bankruptcy courts "have summary jurisdiction to adjudicate controversies relating to property over which they have actual or constructive possession." *Thompson* v. *Magnolia Petroleum Co.,* 309 U. S. 478, 481; *Cline* v. *Kaplan,* 323 U. S. 97, 98–99; *May* v. *Henderson,* 268 U. S. 111, 115–116; *Taubel-Scott-Kitzmiller Co.* v. *Fox,* 264 U. S. 426, 432–434. They also deal in a summary way with "matters of an administrative character, including questions between the bankrupt and his creditors, which are presented in the ordinary course of the administration of the bankrupt's estate." *Taylor* v. *Voss,* 271 U. S. 176, 181; *U. S. Fidelity Co.* v. *Bray,* 225 U. S. 205, 218. This is elementary bankruptcy law which petitioner does not dispute.

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[1] *B. F. Avery & Sons Co.* v. *Davis*, 192 F. 2d 255 (C. A. 5th Cir. 1951), cert. denied, 342 U. S. 945, held the referee did not have summary jurisdiction to entertain the trustee's demand for surrender of the preference. In *Avery*, the preference arose out of a different transaction than the creditor's claim, and a subsequent decision of the Fifth Circuit notes that although that fact was not the articulated basis of the *Avery* decision, it may not preclude summary jurisdiction to order return of a preference received in the same transaction. *Gill* v. *Phillips*, 337 F. 2d 258 (1964), opinion on denial of rehearing, 340 F. 2d 318 (C. A. 5th Cir. 1965). The Fifth Circuit rule is thus uncertain, but *Avery* at least prevents summary recovery of unrelated preferences. Several Courts of Appeals have upheld the summary jurisdiction of the referee over counterclaims arising out of the same transaction as the creditor's claim but have stated that such jurisdiction does not extend to permissive counterclaims arising out of distinct transactions. See *In re Solar Mfg. Corp.*, 200 F. 2d 327 (C. A. 3d Cir. 1952), cert. denied *sub nom. Marine Midland Trust Co.* v. *McGirl*, 345 U. S. 940; *In re Majestic Radio & Television Corp.*, 227 F. 2d 152 (C. A. 7th Cir. 1955), cert. denied *sub nom. Dwyer* v. *Franklin*, 350 U. S. 995; *Peters* v. *Lines*, 275 F. 2d 919 (C. A. 9th Cir. 1960). The decision presently under review upholds summary jurisdiction to order return of a preference whether or not the preference relates to the same transaction as the claim but declines to extend such jurisdiction to unrelated counterclaims not involving a preference, set-off, voidable lien, or a fraudulent transfer. 336 F. 2d, at 537.

But petitioner points out that if a creditor who has received a preference does not file a claim in the bankruptcy proceeding and holds the property he received under a substantial adverse claim, so that the property may not be deemed within the actual or constructive possession of the bankruptcy court, the trustee may recover the preference only by a plenary action under § 60 of the Act, 11 U. S. C. § 96 (1964 ed.), see *Taubel-Scott-*

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[2] Bankruptcy Act § 2a, 11 U. S. C. § 11 (a) (1964 ed.), provides: "(a) The courts of the United States hereinbefore defined as courts of bankruptcy are created courts of bankruptcy and are invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this title . . . ."

Kitzmiller Co. v. *Fox,* 264 U. S. 426; and in a plenary action in the federal courts the creditor could demand a jury trial, *Schoenthal* v. *Irving Trust Co.,* 287 U. S. 92, 94–95; *Adams* v. *Champion,* 294 U. S. 231, 234; compare *Buffum* v. *Peter Barceloux Co.,* 289 U. S. 227, 235–236. Petitioner contends the situation is the same when the creditor files a claim and the trustee not only objects to allowance of the claim but also demands surrender of the preference. This is so, petitioner argues, because the Bankruptcy Act does not confer summary jurisdiction on a bankruptcy court to order preferences surrendered and because, if it does, petitioner's rights under the Seventh Amendment of the Constitution are violated. We agree with neither contention.

With respect to the statutory question, it must be conceded that the Bankruptcy Act does not in express terms confer summary jurisdiction to order claimants to surrender preferences. But Congress has often left the exact scope of summary proceedings in bankruptcy undefined, and this Court has elsewhere recognized that in the absence of congressional definition this is a matter to be determined by decisions of this Court after due consideration of the structure and purpose of the Bankruptcy Act as a whole, as well as the particular provisions of the Act brought in question. *Taubel-Scott-Kitzmiller Co.* v. *Fox,* 264 U. S. 426, 431 and n. 7.

When Congress enacted general revisions of the bankruptcy laws in 1898 and 1938, it gave "special attention to the subject of making [the bankruptcy laws] inexpensive in [their] administration." H. R. Rep. No. 1228, 54th Cong., 1st Sess., p. 2; H. R. Rep. No. 1409, 75th Cong., 1st Sess., p. 2; S. Rep. No. 1916, 75th Cong., 3d Sess., p. 2. Moreover, this Court has long recognized that a chief purpose of the bankruptcy laws is "to secure a prompt and effectual administration and settlement of the estate of all bankrupts within a limited period," *Ex* *parte Christy,* 3 How. 292, 312, and that provision for summary disposition, "without regard to usual modes of trial attended by some necessary delay," is one of the means chosen by Congress to effectuate that purpose, *Bailey* v. *Glover,* 21 Wall. 342, 346. See generally *Wiswall* v. *Campbell,* 93 U. S. 347, 350–351; *U. S. Fidelity Co.* v. *Bray,* 225 U. S. 205, 218.

It is equally clear that the expressly granted power to "allow," "disallow" and "reconsider" claims, Bankruptcy Act § 2a (2), 11 U. S. C. § 11 (a)(2) (1964 ed.),[3] which is of "basic importance in the administration of a bankruptcy estate," *Gardner* v. *New Jersey,* 329 U. S. 565, 573, is to be exercised in summary proceedings and not by the slower and more expensive processes of a plenary suit. *U. S. Fidelity Co.* v. *Bray,* 225 U. S. 205, 218; *Wiswall* v. *Campbell,* 93 U. S. 347, 350–351. This power to allow or to disallow claims includes "full power to inquire into the validity of any alleged debt or obligation of the bankrupt upon which a demand or a claim against the estate is based. This is essential to the performance of the duties imposed upon it." *Lesser* v. *Gray,* 236 U. S. 70, 74. The trustee is enjoined to examine all claims and to present his objections, Bankruptcy Act § 47a (8), 11 U. S. C. § 75 (a)(8) (1964 ed.),[4] and "[w]hen objections are made, [the court] is duty bound to pass on them," *Gardner* v. *New Jersey,* 329 U. S. 565, 573. "The whole process of proof, allowance, and distribution is, shortly speaking, an adjudication of interests claimed in a *res,*" *id.,* at 574, and thus falls within the principle quoted above that bankruptcy courts have summary jurisdiction to adjudicate controversies relating to property within their possession. Further, the Act itself directs that "[o]bjections to claims shall be heard and determined as soon as the convenience of the court and the best interests of the estates and the claimants will permit," Bankruptcy Act § 57f, 11 U. S. C. § 93 (f) (1964 ed.), and a committee report indicates that the provision means that "[o]bjections shall be heard and determined in a summary way," H. R. Rep. No. 1674, 52d Cong., 1st Sess., p. 20.

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[3] 11 U. S. C. § 11 (a)(2) confers power to:

"(2) Allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates."

[4] 11 U. S. C. § 75 (a)(8) provides that trustees shall:

"(8) examine all proofs of claim and object to the allowance of such claims as may be improper."

Section 57 of the Act contains another important congressional directive around which much of this case turns. Subsection g forbids the allowance of a claim when the creditor has "received or acquired preferences . . . void or voidable under this title," absent a surrender of any preference. Bankruptcy Act § 57g, 11 U. S. C. § 93 (g) (1964 ed.).[5] Unavoidably and by the very terms of the Act, when a bankruptcy trustee presents a § 57g objection to a claim, the claim can neither be allowed nor disallowed until the preference matter is adjudicated. The objection under § 57g is, like other objections, part and parcel of the allowance process and is subject to summary adjudication by a bankruptcy court. This is the plain import of § 57 and finds support in the same policy of expedition that underlies the necessity for summary action in many other proceedings under the Act.

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[5] 11 U. S. C. § 93 (g) provides:

"(g) The claims of creditors who have received or acquired preferences, liens, conveyances, transfers, assignments or encumbrances, void or voidable under this title, shall not be allowed unless such creditors shall surrender such preferences, liens, conveyances, transfers, assignments, or encumbrances."

The language of this section, it will be observed, is concerned with *creditors* rather than *claims* and thus contemplates that allowance of a claim may be conditioned on surrender of preferences received with respect to transactions unrelated to the claims. The exact reach of § 57g is not entirely settled, see 3 Collier on Bankruptcy, ¶ 57.19 [3.2] (14th ed. 1964), and that question is not involved here.

There is no contrary indication in any other provision of the Act. The provisions of the Acts of 1800 and 1841 which gave the creditor the right to have his claim tried by a jury were not repeated in the Acts of 1867 and 1898.[6] Section 19 of the current law, Bankruptcy Act § 19, 11 U. S. C. § 42 (1964 ed.), requires a jury in only limited situations and is not helpful to petitioner in this case. It is true that § 60, dealing with preferences and their voidability, confers concurrent jurisdiction on state courts and the federal bankruptcy courts to entertain *plenary* suits for the recovery of preferences. But by its own terms this provision applies only "where plenary proceedings are necessary" and hence itself contemplates nonplenary recovery proceedings.[7]

If anything, the other provisions of the Act support the view that § 57g objections are to be summarily determined. Section 57k provides for reconsideration of claims that have previously been allowed, and § 57l provides that when a claim has been reconsidered and rejected the trustee may recover any dividend previously paid on it, proceedings for such recovery to be within the summary jurisdiction of a bankruptcy court.[8] Even under the predecessor to the present section, which did not expressly provide that the dividend could be summarily recovered, Bankruptcy Act of 1898, § 57l, 30 Stat. 561, this Court held that the referee had jurisdiction to determine whether a preference has been received and to order return of the dividend. *Pirie* v. *Chicago Title & Trust Co.,* 182 U. S. 438, 455–456.[9] So

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[6] The history of the early jury trial provisions is traced in *In re United Button Co.*, 140 F. 495 (D. C. D. Del.), aff'd *sub nom. Brown & Adams* v. *United Button Co.*, 149 F. 48 (C. A. 3d Cir. 1906).

[7] Bankruptcy Act § 60b, 11 U. S. C. § 96 (b) (1964 ed.), provides:

"(b) Any such preference may be avoided by the trustee if the creditor receiving it or to be benefited thereby or his agent acting with reference thereto has, at the time when the transfer is made, reasonable cause to believe that the debtor is insolvent. Where the preference is voidable, the trustee may recover the property or, if it has been converted, its value from any person who has received or converted such property, except a bona-fide purchaser from or lienor of the debtor's transferee for a present fair equivalent value . . . . For the purpose of any recovery or avoidance under this section, where plenary proceedings are necessary, any State court which would have had jurisdiction if bankruptcy had not intervened and any court of bankruptcy shall have concurrent jurisdiction."

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[8] Bankruptcy Act §§ 57k and 57l, 11 U. S. C. §§ 93 (k) and (*l*) (1964 ed.), provide:

"(k) Claims which have been allowed may be reconsidered for cause and reallowed or rejected in whole or in part according to the equities of the case, before but not after the estate has been closed.

"(*l*) Whenever a claim shall have been reconsidered and rejected, in whole or in part, upon which a dividend has been paid, the trustee may recover from the creditor the amount of the dividend received upon the claim if rejected in whole, or the proportional part thereof if rejected only in part, and the trustee may also recover any excess dividend paid to any creditor. The court shall have summary jurisdiction of a proceeding by the trustee to recover any such dividends."

[9] Under the Act as it then stood, the preference involved in *Pirie* was not voidable or recoverable but nevertheless was ample ground for disallowance of the claim. But the creditor argued that compelling repayment of the dividend would constitute determination of a "suit by the trustee" without the consent of the defendant contrary to the provisions of then § 23b (presently codified, without alterations material to the present discussion, in 11 U. S. C. § 46 (b) (1964 ed.)) that:

"b Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant." 30 Stat. 552.

That argument was rejected by the Court on the ground the proceedings under review were not a "suit" within the meaning of the too, proceedings under § 60d, 11 U. S. C. § 96 (d) (1964 ed.),[10] for examination of the reasonableness of amounts paid in contemplation of bankruptcy to an attorney for services to be rendered for the bankrupt are within the summary jurisdiction of the referee although the Act does not expressly so provide. *In re Wood and Henderson,* 210 U. S. 246; *Conrad, Rubin & Lesser* v. *Pender,* 289 U. S. 472.

So far we have been discussing principles applicable to a case where the trustee presents a § 57g objection to a claim but does not seek the affirmative relief of surrender of the preference. But once it is established that the issue of preference may be summarily adjudicated absent an affirmative demand for surrender of the pref-

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quoted provision. 182 U. S., at 455–456. We apply that reasoning in our opinion today and hold that determination of objections to claims, whether or not affirmative relief is decreed, does not constitute adjudication of a suit by the trustee, and thus it is not necessary to ascertain whether the creditor has "consented" to such determination within the meaning of § 23b. Rather, our decision is governed by the "traditional bankruptcy law that he who invokes the aid of the bankruptcy court by offering a proof of claim and demanding its allowance must abide the consequences of that procedure. *Wiswall* v. *Campbell,* 93 U. S. 347, 351." *Gardner* v. *New Jersey,* 329 U. S. 565, 573. As this is the basis of our decision, we obviously intimate no opinion concerning whether the referee has summary jurisdiction to adjudicate a demand by the trustee for affirmative relief, all of the substantial factual and legal bases for which have not been disposed of in passing on objections to the claim.

[10] 11 U. S. C. § 96 (d) provides:

"(d) If a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney at law, for services rendered or to be rendered, the transaction may be examined by the court on its own motion or shall be examined by the court on petition of the trustee or any creditor and shall be held valid only to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate. . . ."

erence, it can hardly be doubted that there is also summary jurisdiction to order the return of the preference. This is so because in passing on a § 57g objection a bankruptcy court must necessarily determine the amount of preference, if any, so as to ascertain whether the claimant, should he return the preference, has satisfied the condition imposed by § 57g on allowance of the claim. *Schwartz* v. *Levine & Malin, Inc.*, 111 F. 2d 81 (C. A. 2d Cir. 1940). Thus, once a bankruptcy court has dealt with the preference issue nothing remains for adjudication in a plenary suit. The normal rules of *res judicata* and collateral estoppel apply to the decisions of bankruptcy courts. *Chicot County Drainage District* v. *Baxter State Bank,* 308 U. S. 371, 376–377; *Stoll* v. *Gottlieb,* 305 U. S. 165. More specifically, a creditor who offers a proof of claim and demands its allowance is bound by what is judicially determined, *Wiswall* v. *Campbell,* 93 U. S. 347, 351; and if his claim is rejected, its validity may not be relitigated in another proceeding on the claim. *Sampsell* v. *Imperial Paper Corp.,* 313 U. S. 215, 218–219; *Lesser* v. *Gray,* 236 U. S. 70, 75. The Courts of Appeals have uniformly applied these principles to hold that a bankruptcy court's resolution of the § 57g objection is *res judicata* in a subsequent action by the trustee under § 60 to recover the preference. *Schwartz* v. *Levine & Malin, Inc.,* 111 F. 2d 81 (C. A. 2d Cir. 1940); *Giffin* v. *Vought,* 175 F. 2d 186 (C. A. 2d Cir. 1949); *Ullman, Stern & Krausse* v. *Coppard,* 246 F. 124 (C. A. 5th Cir. 1917); *Breit* v. *Moore,* 220 F. 97 (C. A. 9th Cir. 1915); *Johnson* v. *Wilson,* 118 F. 2d 557 (C. A. 9th Cir. 1941); see *In re J. R. Palmenberg Sons,* 76 F. 2d 935 (C. A. 2d Cir. 1935), aff'd *sub nom. Bronx Brass Foundry, Inc.* v. *Irving Trust Co.,* 297 U. S. 230. To require the trustee to commence a plenary action in such circumstances would be a meaningless gesture, and it is well within the equitable powers of the bankruptcy court to order return of the preference during the summary proceedings on allowance and disallowance of claims. Compare *In re Wood and Henderson,* 210 U. S. 246, 256 (determination of reasonableness of attorney's fee would be *res judicata* in suit to recover the excess), with *Conrad, Rubin & Lesser* v. *Pender,* 289 U. S. 472 (upholding turnover order). What we said in *Alexander* v. *Hillman,* 296 U. S. 222, in connection with the jurisdiction of a receivership court to entertain a counterclaim against a claimant in the receivership proceeding, is equally applicable here:

> "By presenting their claims respondents subjected themselves to all the consequences that attach to an appearance . . . .
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> "Respondents' contention means that, while invoking the court's jurisdiction to establish their right to participate in the distribution, they may deny its power to require them to account for what they misappropriated. In behalf of creditors and stockholders, the receivers reasonably may insist that, before taking aught, respondents may by the receivership court be required to make restitution. That requirement is in harmony with the rule generally followed by courts of equity that having jurisdiction of the parties to controversies brought before them, they will decide all matters in dispute and decree complete relief." 296 U. S., at 241–242.

Our examination of the structure and purpose of the Bankruptcy Act and the provisions dealing with allowance of claims therefore leads us to conclude, and we so hold, that the Act does confer summary jurisdiction to compel a claimant to surrender preferences that under § 57g would require disallowance of the claim.[11] A number of Courts of Appeals, including the court below, have reached similar results.[12]

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[11] See note 5, *supra.*

Petitioner contends, however, that this reading of the statute violates his Seventh Amendment right to a jury trial. But although petitioner might be entitled to a jury trial on the issue of preference if he presented no claim in the bankruptcy proceeding and awaited a federal plenary action by the trustee, *Schoenthal* v. *Irving Trust Co.*, 287 U. S. 92, when the same issue arises as part of the process of allowance and disallowance of claims, it is triable in equity. The Bankruptcy Act, passed pursuant to the power given to Congress by Art. I, § 8, of the Constitution to establish uniform laws on the subject of bankruptcy, converts the creditor's legal claim into an equitable claim to a pro rata share of the *res*, *Gardner* v. *New Jersey*, 329 U. S. 565, 573–574, a share which can neither be determined nor allowed until the creditor disgorges the alleged voidable preference he has already received. See *Alexander* v. *Hillman*, 296 U. S. 222, 242. As bankruptcy courts have summary jurisdiction to adjudicate controversies relating to property over which they have actual or constructive possession, *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478, 481; *Cline* v. *Kaplan*, 323 U. S. 97, 98–99; *May* v. *Henderson*, 268 U. S. 111, 115–116, and as the proceedings of bankruptcy courts are inherently proceedings in equity, *Local Loan Co.* v. *Hunt*, 292 U. S. 234, 240; *Pepper* v. *Litton*, 308 U. S. 295, 304, there is no Seventh Amendment right to a jury trial for determination of objections to claims, including § 57g objections. As this Court has previously said in answering the argument that disputed claims must be tried before a jury:

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[12] See the decisions cited in note 1, *supra*, upholding summary jurisdiction to grant affirmative relief on related counterclaims that would also be defenses to the claim, particularly *In re Solar Mfg. Corp.*, 200 F. 2d 327, 331 (C. A. 3d Cir. 1952), cert. denied *sub nom. Marine Midland Trust Co.* v. *McGirl*, 345 U. S. 940; *In re Majestic Radio & Television Corp.*, 227 F. 2d 152, 156 (C. A. 7th Cir. 1955), cert. denied *sub nom. Dwyer* v. *Franklin*, 350 U. S. 995. See also *Florance* v. *Kresge*, 93 F. 2d 784 (C. A. 4th Cir. 1938); *Floro Realty & Inv. Co.* v. *Steem Electric Corp.*, 128 F. 2d 338 (C. A. 8th Cir. 1942).

> "But those who use this argument lose sight of the fundamental principle that the right of trial by jury, considered as an absolute right, does not extend to cases of equity jurisdiction. If it be conceded or clearly shown that a case belongs to this class, the trial of questions involved in it belongs to the court itself, no matter what may be its importance or complexity.
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> "So, in cases of bankruptcy, many incidental questions arise in the course of administering the bankrupt estate, which would ordinarily be pure cases at law, and in respect of their facts triable by jury, but, as belonging to the bankruptcy proceedings, they become cases over which the bankruptcy court, which acts as a court of equity, exercises exclusive control. Thus a claim of debt or damages against the bankrupt is investigated by chancery methods."

Barton v. *Barbour,* 104 U. S. 126, 133–134. This has been the characteristic view of the courts. *Carter* v. *Lechty,* 72 F. 2d 320 (C. A. 8th Cir. 1934); *In re Michigan Brewing Co.,* 24 F. Supp. 430 (W. D. Mich. 1938), aff'd, 101 F. 2d 1007 (C. A. 6th Cir. 1939); *In re Rude,* 101 F. 805 (D. C. D. Ky. 1900); *In re Christensen,* 101 F. 243 (D. C. N. D. Iowa 1900). See also *In re Wood and Henderson,* 210 U. S. 246, 258; *Pirie* v. *Chicago Title & Trust Co.,* 182 U. S. 438, 455–456.

And of course it makes no difference, so far as petitioner's Seventh Amendment claim is concerned, whether the bankruptcy trustee urges only a § 57g objection or also seeks affirmative relief. In practical effect, the denial of a jury trial would be no less were the bankruptcy court merely to determine the existence and amount of the preference, since that determination would be entitled to *res judicata* effect in any subsequent plenary action. And we have held that equity courts have power to decree complete relief and for that purpose may accord what would otherwise be legal remedies. See *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U. S. 288, 291–292; *Porter* v. *Warner Co.*, 328 U. S. 395, 398–399; *Alexander* v. *Hillman*, 296 U. S. 222; *McGowan* v. *Parish*, 237 U. S. 285, 296.

Petitioner's final reliance is on the doctrine of *Beacon Theatres* v. *Westover*, 359 U. S. 500, and *Dairy Queen* v. *Wood*, 369 U. S. 469, that "where both legal and equitable issues are presented in a single case, 'only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims.' " 369 U. S., at 472–473.

The argument here is that the same issues—whether the creditor has received a preference and, if so, its amount—may be presented either as equitable issues in the bankruptcy court or as legal issues in a plenary suit and that the bankruptcy court should stay its own proceedings and direct the bankruptcy trustee to commence a plenary suit so as to preserve petitioner's right to a jury trial. Unquestionably the bankruptcy court would have power to give such an instruction to the trustee, *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478, 483–484; see Bankruptcy Act § 2a (7), 11 U. S. C. § 11 (a)(7) (1964 ed.), and some lower courts have required such a procedure, *B. F. Avery & Sons Co.* v. *Davis*, 192 F. 2d 255 (C. A. 5th Cir. 1951), cert. denied, 342 U. S. 945;

Triangle Electric Co. v. *Foutch,* 40 F. 2d 353 (C. A. 8th Cir. 1930); see *Katchen* v. *Landy,* 336 F. 2d 535, 543 (C. A. 10th Cir. 1964) (Phillips, J., dissenting in part). Nevertheless we think this argument must be rejected.

At the outset, we note that the *Dairy Queen* doctrine, if applicable at all, is applicable whether or not the trustee seeks affirmative relief. For, as we have said, determination of the preference issues in the equitable proceeding would in any case render unnecessary a trial in the plenary action because of the *res judicata* effect to which that determination would be entitled. Thus petitioner's argument would require that in every case where a § 57g objection is interposed and a jury trial is demanded the proceedings on allowance of claims must be suspended and a plenary suit initiated, with all the delay and expense that course would entail. Such a result is not consistent with the equitable purposes of the Bankruptcy Act nor with the rule of *Beacon Theatres* and *Dairy Queen,* which is itself an equitable doctrine, *Beacon Theatres* v. *Westover,* 359 U. S., at 509–510. In neither *Beacon Theatres* nor *Dairy Queen* was there involved a specific statutory scheme contemplating the prompt trial of a disputed claim without the intervention of a jury. We think Congress intended the trustee's § 57g objection to be summarily determined; and to say that because the trustee could bring an independent suit against the creditor to recover his voidable preference, he is not entitled to have his statutory objection to the claim tried in the bankruptcy court in the normal manner is to dismember a scheme which Congress has prescribed. See *Alexander* v. *Hillman,* 296 U. S. 222, 243. Both *Beacon Theatres* and *Dairy Queen* recognize that there might be situations in which the Court could proceed to resolve the equitable claim first even though the results might be dispositive of the issues involved in the legal claim. To implement congressional intent, we think it essential to hold that the bankruptcy court may summarily adjudicate the § 57g objection; and, as we have held above, the power to adjudicate the objection carries with it the power to order surrender of the preference.

Affirmed.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS dissent for the reasons stated in the dissenting opinion of Judge Phillips in the Court of Appeals.

UNITED STATES *v.* YAZELL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 10. Argued October 13, 1965.—Decided January 17, 1966.

The Small Business Administration (SBA) made a disaster loan to Yazell, and to his wife who is respondent here, following flood damage to their shop in Lampasas, Texas. The loan was individually negotiated. The chattel mortgage which secured the loan specifically made reference to Texas law in several respects. After default by the Yazells on the note, and foreclosure of the mortgage, the Government brought this suit against the Yazells for the deficiency. Respondent, Mrs. Yazell, moved for summary judgment on the ground that under the Texas law of coverture she had no capacity to bind herself personally by contract on the facts of this case, and hence the contract could not be enforced against her separate property. During the negotiation of the loan, the SBA had at no time indicated an intention that the Texas law in this regard would not apply, nor had the SBA required respondent to have her disability of coverture removed pursuant to Texas law. The District Court granted the motion for summary judgment, and the Court of Appeals affirmed, against the Government's contention that even in the absence of any express federal statute or regulation on the matter or any indication in the loan contract itself, questions of capacity to contract with the SBA and to subject property to liability on such a contract are governed by federal and not local law, and that federal law should not recognize the state coverture doctrine. *Held:* There is no federal interest which requires that the local law be overridden in this case in order that the Federal Government be enabled to collect in supervention of the state law of coverture. It is not necessary to decide whether the state law applies by reason of adoption by federal law or *ex proprio vigore*. Pp. 345–358.

(a) This was "a custom-made, hand-tailored, specifically negotiated transaction. It was not a nationwide act of the Federal Government, emanating in a single form from a single source." Pp. 345–348.

(b) In the absence of specific provision in the federal statute or regulation, or in the contract itself, the federal interest in the collection of an amount due on a contract individually negotiated by a federal agency does not justify displacing state law in the peculiarly local field of family and family-property rights and immunities. Pp. 348–349.

(c) The right of the Federal Government to choose those with whom it contracts is not involved. Pp. 349–350.

(d) State interests where family and family-property arrangements are involved should not be overridden by federal courts unless substantial national interests will be significantly impaired by application of the state law. Pp. 351–353.

(e) Where federal judge-made law has been created to supersede substantive state law, the federal interest has reflected a need, such as the necessity for uniform national application, for such supersession. *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, distinguished. Pp. 353–354.

(f) This Court has, where appropriate, adopted state rules of law as the federal law to be applied, despite the consequent diversity in the rights and obligations of the United States in the different States. Pp. 354–357.

334 F. 2d 454, affirmed.

Solicitor General Marshall argued the cause for the United States. On the brief were former *Solicitor General Cox, Assistant Attorney General Douglas, Louis F. Claiborne, Sherman L. Cohn* and *Edward Berlin.*

J. V. Hammett argued the cause and filed a brief for respondent.

MR. JUSTICE FORTAS delivered the opinion of the Court.

This case presents an aspect of the continuing problem of the interaction of federal and state laws in our complex federal system. Specifically, the question presented is whether, in the circumstances of this case, the Federal Government, in its zealous pursuit of the balance due on a disaster loan made by the Small Business Administration, may obtain judgment against Ethel Mae

Yazell of Lampasas, Texas. At the time the loan was made, Texas law provided that a married woman could not bind her separate property unless she had first obtained a court decree removing her disability to contract.[1] Mrs. Yazell had not done so. At all relevant times she was a beneficiary of the peculiar institution of coverture which is now, with some exceptions, relegated to history's legal museum.

The impact of the quaint doctrine of coverture upon the federal treasury is therefore of little consequence. Even the Texas law which gave rise to the difficulty was repealed in 1963.[2] The amount in controversy in this extensive litigation, about $4,000, is important only to the Yazell family. But the implications of the controversy are by no means minor. Using *Clearfield Trust Co.* v. *United States,* 318 U. S. 363, as its base, the Government here seeks to occupy new ground in the inevitable conflict between federal interest and state law. The Government was rebuffed by the trial and appellate courts. We hold that in the circumstances of this case, the state rule governs, and, accordingly, we affirm the decision of the United States Court of Appeals for the Fifth Circuit, 334 F. 2d 454.[3]

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[1] Tex. Rev. Civ. Stat. Ann. Art. 4626. This section, as amended by Acts 1963, 58th Leg., p. 1188, c. 472, § 6, now gives to Texas wives the capacity to contract. Under old Art. 4626 a married woman could have her disability removed.

[2] See note 1, *supra.*

[3] The Court of Appeals by a vote of two to one affirmed the decision of the District Court in favor of the wife, based upon the Texas law of coverture. The action was instituted by the United States to recover the balance due on a note of approximately $12,000, secured by a chattel mortgage. The note was signed by both husband and wife. The mortgage had been foreclosed, the pledged assets sold, and a deficiency judgment was rendered against the husband in this same action. No appeal was taken by the husband.

Reference in some detail to the facts of this case will illuminate the problem.[4] Delbert L. Yazell operated in Lampasas, Texas, a small shop to sell children's clothing. The shop was called Yazell's Little Ages. Occasionally, his wife, Ethel Mae, assisted in the business. The business, under Texas law, was the community property of husband and wife, who, however, were barred by the coverture statute from forming a partnership. *Dillard* v. *Smith,* 146 Tex. 227, 230, 205 S. W. 2d 366, 367. A disastrous flood occurred in Lampasas on May 12, 1957. The stock of Yazell's Little Ages was ruined. Its fixtures were seriously damaged.[5]

The Small Business Administration had a regional office in Dallas, Texas. As of December 31, 1963, the agency had outstanding in Texas, generally under the supervision of its Dallas regional office, 1,363 business loans and 4,172 disaster loans, aggregating more than $60,000,000.[6] Upon the occurrence of the Lampasas flood, the SBA opened a Disaster Loan Office in Lampasas, under the direction of the Dallas office.[7]

On June 10, 1957, Mr. Yazell conferred with a representative of the SBA about a loan to enable him to cope with the disaster to his business. After a careful, detailed but commendably prompt investigation, the head of SBA's Disaster Loan Office wrote Mr. Yazell on June 20, 1957, that authorization for a loan of $12,000 had been received. Yazell was informed that the loan would be made upon his compliance with certain requirements. He was told that a named law firm in Lampasas had been employed by the SBA to assist him in complying with the terms of the authorization.[8]

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[4] In the discussion which follows, as specifically indicated by reference to "SBA file," we have occasionally referred to the official file of the Small Business Administration on the Yazell loan to supplement the record with facts which disclose the agency's practice.

[5] SBA file.

[6] Brief of the United States, p. 12.

[7] SBA file.

Yazell and his wife "doing business as" Yazell's Little Ages then signed a note in the amount of $12,000, payable to the order of SBA in Dallas at the rate of $120 per month including 3% interest. On the same day they also executed a chattel mortgage on their stock of merchandise and their store fixtures. By express reference to Article 4000 of the Revised Civil Statutes of Texas, the chattel mortgage exempted from its coverage retail sales made from the stock. The chattel mortgage was accompanied by a separate acknowledgment of Mrs. Yazell before a notary public, which was required by Texas law as a part of the institution of coverture. The notary attested, in the words of the applicable Texas statute, that "Ethel Mae Yazell, wife of Delbert L. Yazell . . . whose name is subscribed to the [chattel mortgage] . . . having been examined by me privily and apart from her husband . . . acknowledged such instrument to be her act and deed, and declared that she had willingly signed the same . . . ." See Tex. Rev. Civ. Stat. Ann. Art. 6608. See also Art. 1300, 4618 (Supp. 1964), 6605. These statutes all relate to conveyances of the marital homestead.

The note, chattel mortgage and accompanying documents were in due course sent to the Dallas office of SBA. Both the Lampasas law firm engaged by SBA to assist Yazell and the Acting Regional Counsel of SBA certified that "all action has been taken deemed desirable . . . to assure the validity and legal enforceability of the Note." Thereafter, the funds were made available to Yazell pursuant to the terms of the loan.[9]

From the foregoing, it is clear (1) that the loan to Yazell was individually negotiated in painfully particularized detail, and (2) that it was negotiated with specific reference to Texas law including the peculiar acknowledgment set forth above. None of the prior cases decided by this Court in which the federal interest has been held to override state law resembles this case in these respects; the differences are intensely material to the resolution of the issue presented.

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[8] SBA file.

[9] SBA file.

Next, it seems clear (1) that the SBA was aware and is chargeable with knowledge that the contract would be subject to the Texas law of coverture; (2) that both the SBA and the Yazells entered into the contract without any thought that the defense of coverture would be unavailable to Mrs. Yazell with respect to her separate property as provided by Texas law; and (3) that, in the circumstances, the United States is seeking the unconscionable advantage of recourse to assets for which it did not bargain. These points will be briefly elaborated before we reach the ultimate issue: whether, despite all of the foregoing, some "federal interest" requires us to give the United States this advantage.

It will be noted that the transaction was custom-tailored by officials of SBA located in Dallas and Lampasas, Texas, and undoubtedly familiar with Texas law. It was twice approved by Texas counsel who certified that "all action has been taken deemed desirable" even though no effort was made to cause Mrs. Yazell to have her incapacity removed under Texas law.[10] In at least two decisions since 1949, federal courts had applied the Texas law of coverture in actions under federal statutes.[11] At no time does it appear that the SBA made the slightest suggestion to the Yazells or their

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[10] See note 1, *supra.*

[11] *United States* v. *Belt,* 88 F. Supp. 510 (D. C. S. D. Tex.) (suit held barred by coverture); *Texas Water Supply Corp.* v. *Reconstruction Finance Corp.,* 204 F. 2d 190 (C. A. 5th Cir.) (case held within an exception to coverture).

SBA-appointed counsel that it intended to enforce the contract against Mrs. Yazell's separate property.[12] The forms used, although specifically adapted to this transaction and to Texas law, made no reference to such an intent, and it is either probable or certain that no such intent existed. As stated above, the SBA now has more than 5,000 loans outstanding in Texas.[13] The Solicitor General informed the Court that the SBA, in conformity with the general practice of government lending agencies, requires that the signature of the wife be obtained as a routine matter.[14] If it had been intended that the result now sought by the Government would obtain, simple fairness as well as elementary craftsmanship would have dictated that in a Texas agreement the wife be advised, at least by formal notation, that she was, in the opinion of SBA, binding her separate property, despite Texas law to the contrary. Again, it must be emphasized that this was a custom-made, hand-tailored, specifically negotiated transaction. It was not a nationwide act of the Federal Government, emanating in a single form from a single source.[15]

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[12] SBA file.

[13] The Ninth Circuit, in *Bumb* v. *United States,* 276 F. 2d 729 (C. A. 9th Cir.), aptly observed in response to a claim by the Small Business Administration that the "need for uniformity" excused it from complying with a California "bulk sales" statute requiring notice of intent to mortgage:

"It is true that the Small Business Administration operates throughout the United States, but such fact raises no presumption of the desirability of a uniform federal rule with respect to the validity of chattel mortgages in pursuance of the lending program of the Small Business Administration. The largeness of the business of the Small Business Administration offers no excuse for failure to comply with reasonable requirements of local law, which are designed to protect local creditors against undisclosed action by their local debtors which impair the value of their claims. It must be assumed that the Small Business Administration maintains competent personnel familiar with the laws of the various states in which it conducts business, and who are advised of the steps required by local law in order to acquire a valid security interest within the various states." *Id.,* at 738.

[14] Brief for the United States, p. 11.

We now come to the basic issue which this case presents to this Court. Is there a "federal interest" in collecting the deficiency from Mrs. Yazell's separate property which warrants overriding the Texas law of coverture? Undeniably there is always a federal interest to collect moneys which the Government lends. In this case, the federal interest is to put the Federal Government in position to levy execution against Mrs. Yazell's separate property, if she has any, for the unpaid balance of the $12,000 disaster loan after the stock of merchandise and fixtures of the store have been sold, after any other community property has been sold, and after Mr. Yazell's leviable assets have been exhausted. The desire of the Federal Government to collect on its loans is understandable. Perhaps even in the case of a disaster loan, the zeal of its representatives may be commended. But this serves merely to present the question—not to answer it. Every creditor has the same interest in this respect; every creditor wants to collect.[16] The United States, as sovereign, has certain preferences and priorities,[17] but neither Congress nor this Court has ever asserted that they are absolute. For example, no contention will or can be made that the United States may by judicial fiat collect its loan with total disregard of state laws such as homestead exemptions.[18] Accordingly, generalities as to the paramountcy of the federal interest do not lead inevitably to the result the Government seeks. Our problem remains: whether in connection with an individualized, negotiated contract, the Federal Government may obtain a preferred right which is not provided by statute or specific agency regulation, which was not a part of its bargain, and which requires overriding a state law dealing with the intensely local interests of family property and the protection (whether or not it is up-to-date or even welcome) of married women.

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[15] Contrast *Clearfield Trust Co.* v. *United States*, 318 U. S. 363. Compare also *United States* v. *Helz*, 314 F. 2d 301 (C. A. 6th Cir.), arising under the National Housing Act, 48 Stat. 1246, 12 U. S. C. § 1702 *et seq.*, which issues separate forms for each State but does not negotiate with individual applicants. See *United States* v. *View Crest Garden Apts., Inc.*, 268 F. 2d 380 (C. A. 9th Cir.), cert. denied, 361 U. S. 884.

[16] In this case, the Yazells' general creditors collected about 20% of their claims.

[17] For example, Congress has provided for preference in the case of debts owed the United States on tax delinquencies. See 26 U. S. C. §§ 6321, 6323 (1964 ed.); 11 U. S. C. § 104 (a)(4) (1964 ed.). 31

The Government asserts that this overriding federal interest can be found in the unlimited right of the Federal Government to choose the persons with whom it will contract, citing *Perkins* v. *Lukens Steel Co.,* 310 U. S. 113, which is remote from the issue at hand.[19] Realisti-

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U. S. C. § 191 (1964 ed.) also provides a priority for the United States in some situations involving ordinary debts. See Kennedy, The Relative Priority of the Federal Government: The Pernicious Career of the Inchoate and General Lien, 63 Yale L. J. 905 (1954).

[18] See pp. 354–356, *infra.*

[19] The Government relies upon *Perkins,* at p. 127, for the proposition that the United States has "the unrestricted power . . . to determine those with whom it will deal." Brief for the United States, p. 9. *Perkins* had nothing to do with the question of the power of the United States to override state law declaring the incapacity of persons to contract. The Court there held that private companies alleging their right as potential bidders for government contracts lacked standing to challenge a federal statute requiring federal procurement contracts to include a minimum wage stipulation. The Government quotes the decision out of context, omitting the following italicized words: the Court stated that "*Like private individuals and businesses,* the Government enjoys the unrestricted power . . . to determine those with whom it will deal, and to fix the terms and

cally, in terms of Yazell's case, this has nothing to do with our problem: The loan was made to enable Yazell to reopen the store after the disaster of the flood. The SBA chose its contractors with knowledge of the limited office of Mrs. Yazell's signature under Texas law. That knowledge did not deter them. If they had "chosen" Mrs. Yazell as their contractor in the sense that her separate property would be liable for the loan, presumably they would have said so, and they would have proceeded with the formalities necessary under Texas law to have her disability removed.[20] In all reality, the assertion that this case involves the right of the United States to choose its beneficiaries cannot determine the issue before us.[21] This case is not a call to strike the shackles of an obsolete law from the hands of a beneficent Federal Government, nor is it a summons to do battle to vindicate the rights of women. It is much more mundane and commercial than either of these. The issue is whether the Federal Government may voluntarily and deliberately make a negotiated contract with knowledge of the limited capacity and liability of the persons with whom it contracts, and thereafter insist, in disregard of such limitation, upon collecting (a) despite state law to the contrary relating to family property rights and liabilities, and (b) in the absence of federal statute, regulation

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conditions upon which it will make needed purchases." Mrs. Yazell would subscribe to *that* proposition—indeed, the brunt of her case is that the Government, in entering ordinary commercial contracts, should be treated "like private individuals and businesses."

[20] See note 1, *supra*.

[21] It is worth noting that in the only situation where the United States' power to choose its contractors might arise—where a married woman has separate property in respect of which she seeks or the Government offers a loan—the Texas law expressly provided for her power to contract and to bind her separate property. Tex. Rev. Civ. Stat. Ann. Art. 4614.

or even any contract provision indicating that the state law would be disregarded.

The institution of coverture is peculiar and obsolete. It was repealed in Texas after the events of this case. It exists, in modified form, in Michigan.[22] But the Government's brief tells us that there are 10 other States which limit in some degree the capacity of married women to contract.[23] In some of these States, such as California, the limitations upon the wife's capacity and responsibility are part of an ingenious, complex, and highly purposeful distribution of property rights between husband and wife, geared to the institution of community property and designed to strike a balance between efficient management of joint property and protection of the separate property of each spouse.[24] It is an appropriate inference from the Government's brief that its position is that the Federal Government, in order to collect on a negotiated debt, may override all such state arrangements despite the absence of congressional enactment or agency regulation or even any stipulation in the negotiated contract or any warning to the persons with whom it contracts.[25]

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[22] Mich. Stat. Ann. §§ 26.161, 26.181, 26.182, 26.183. See *Koengeter* v. *Holzbaugh,* 332 Mich. 280, 50 N. W. 2d 778; Weingarten, Creditors' Rights, 10 Wayne L. Rev. 184 (1963).

[23] Brief for the United States, p. 15, n. 10. The States are, in addition to Texas and Michigan: Alabama, Arizona, California, Florida, Georgia, Idaho, Indiana, Kentucky, Nevada, and North Carolina. With the exception of Michigan, see n. 22, *supra,* none of these States other than Texas has a coverture rule applicable to facts such as those presented by this case.

[24] In California a wife has full capacity to contract. Cal. Civ. Code § 158. Her separate property is liable for her own debts, as are her earnings. Cal. Civ. Code §§ 167, 171. However, in connection with California's community property law governing the management and control of community property, see Cal. Civ. Code (Supp. 1964) §§ 172, 172a, the community property is generally not subject to the debts of the wife. Cal. Civ. Code § 167. See also Ariz. Rev. Stat. Ann. § 25-214; Nev. Rev. Stat. § 123.230.

We do not here consider the question of the constitutional power of the Congress to override state law in these circumstances by direct legislation [26] or by appropriate authorization to an administrative agency coupled with suitable implementing action by the agency.[27] We decide only that this Court, in the absence of specific congressional action, should not decree in this situation that implementation of federal interests requires overriding the particular state rule involved here. Both theory and the precedents of this Court teach us solicitude for state interests, particularly in the field of family and family-property arrangements. They should be overridden by the federal courts only where clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if the state law is applied.

Each State has its complex of family and family-property arrangements. There is presented in this case no reason for breaching them. We have no federal law relating to the protection of the separate property of married women. We should not here invent one and impose it upon the States, despite our personal distaste for coverture provisions such as those involved in this case. Nor should we establish a principle which might cast doubt upon the effectiveness in relevant types of federal suits of the laws of 11 other States relating to the contractual positions of married women, which, as the Government's brief warns us, would be affected by our decision in the present case. Clearly, in the case of these SBA loans there is no "federal interest" which justifies invading the peculiarly local jurisdiction of these States, in disregard of their laws, and of the subtleties reflected by the differences in the laws of the various States which generally reflect important and carefully evolved state arrangements designed to serve multiple purposes.

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[25] The Government's argument, if accepted by this Court, would cast doubt, in addition, on state laws preventing wives from conveying realty without the consent of their husbands—see, *e. g.*, Ala. Code Tit. 34, § 73; Fla. Stat. Ann. (Supp. 1964) § 708.08; Ind. Ann. Stat. § 38–102; Ky. Rev. Stat. § 404.020 (executory sales contract); N. C. Gen. Stat. § 52–2—or from acting as guarantors or sureties—see, *e. g.*, Ga. Code Ann. § 53–503; Ky. Rev. Stat. § 404.010.

[26] See, *e. g.*, *United States* v. *Bess*, 357 U. S. 51, which held that the exemptions from execution to satisfy federal tax liens provided in § 3691 of the Internal Revenue Code of 1939 (now 26 U. S. C. § 6334) are exclusive of state exemptions.

[27] See, *e. g.*, *United States* v. *Shimer*, 367 U. S. 374 (Pennsylvania rule precluding mortgagee who buys mortgaged property at foreclosure from seeking deficiency judgment held inconsistent with scheme of Veterans Administration regulations under which mortgage issued).

The decisions of this Court do not compel or embrace the result sought by the Government. None of the cases in which this Court has devised and applied a federal principle of law superseding state law involved an issue arising from an individually negotiated contract. None of these cases permitted federal imposition and enforcement of liability on a person who, according to state law, was not competent to contract. None of these cases overrode state law in the peculiarly state province of family or family-property arrangements.[28]

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[28] On the contrary, in *De Sylva* v. *Ballentine,* 351 U. S. 570, the Court applied state law to define "children" although the issue arose in connection with the right to renew a copyright—a peculiarly federal area. Cf. *Reconstruction Finance Corp.* v. *Beaver County,* 328 U. S. 204; *Commissioner* v. *Stern,* 357 U. S. 39. We do not regard *Wissner* v. *Wissner,* 338 U. S. 655, as an exception. There California sought to apply its community property rule that a wife has a half interest in her husband's life insurance if the premiums come out of community property (his earnings), in derogation of the federal statutory policy that soldiers have an absolute right to name the beneficiary of their National Service Life Insurance. The Court held

This Court's decisions applying "federal law" to supersede state law typically relate to programs and actions which by their nature are and must be uniform in character throughout the Nation. The leading case, *Clearfield Trust Co.* v. *United States,* 318 U. S. 363, involved the remedial rights of the United States with respect to federal commercial paper. *United States* v. *Allegheny County,* 322 U. S. 174, was treated by the Court as involving the liability of property of the United States to local taxes.[29] *D'Oench, Duhme & Co.* v. *Federal Deposit Ins. Corp.,* 315 U. S. 447, involved the rights of the FDIC as an insurer-assignee of a bank as against the maker of a note given the bank on the secret understanding it would not be called for payment. The bank deposit insurance program is general and standardized. In all relevant aspects, the terms are explicitly dictated by federal law.[30] The Court held that FDIC was entitled to a federal rule protecting it against misrepresentations as to the financial condition of the banks it insures, accomplished by secret arrangements inconsistent with the policy of the applicable federal statutes.

On the other hand, in the type of case most closely resembling the present problem, state law has invariably

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that the California rule would directly have undercut congressional intent with respect to the Federal Government's generalized, nationwide insurance program.

[29] The Court held that a state tax rule under which movable machinery was part of the realty of a manufacturer for purposes of an ad valorem property tax could not be applied so as to subject a manufacturer renting the machinery from the United States to such an enhancement of the value of its realty. The Court held that the title to the machinery was in the United States, and was effective to protect the machinery from local taxes. But compare *Reconstruction Finance Corp.* v. *Beaver County,* 328 U. S. 204.

[30] The statute involved in *D'Oench, Duhme* is now the Federal Deposit Insurance Act, 64 Stat. 873, 12 U. S. C. § 1811 *et seq.* (1964 ed.).

been observed. The leading case is *Fink* v. *O'Neil,* 106 U. S. 272. There the United States sought to levy execution against property defined by state law as homestead and exempted by the State from execution. This Court held that Revised Statutes § 916, now Rule 69 of the Federal Rules of Civil Procedure, governed, and that the United States' remedies on judgments were limited to those generally provided by state law.[31] These homestead exemptions vary widely. They result in a diversity of rules in the various States and in a limitation upon the power of the Federal Government to collect which is comparable to the coverture limitation.[32] The purpose and theory of the two types of limitations are obviously related.[33] Another illustration of acceptance of divergent and limiting state laws is afforded by *Reconstruction Finance Corp.* v. *Beaver County,* 328 U. S. 204. In that case this Court held that the state classification of property owned by the Reconstruction Finance Corporation as "real property" for tax purposes would prevail in determining whether the property was within the class of property as to which Congress had waived the federal exemption from local taxation.

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[31] See also *Custer* v. *McCutcheon,* 283 U. S. 514. Rule 69 provides that procedure on execution shall be "in accordance with the practice and procedure of the state in which the district court is held . . . except that any statute of the United States governs to the extent that it is applicable." With the one exception of federal tax cases, see n. 26, *supra,* state execution procedure seems to be applied without question, even in suits by the United States. See, *e. g., United States* v. *Harpootlian,* 24 F. 2d 646 (C. A. 2d Cir.) (applying state law on the time within which examination can be had of a judgment debtor after an execution against him is returned unsatisfied, over an objection by the Government that this was an improper application of a statute of limitations to the sovereign); *United States* v. *Miller,* 229 F. 2d 839 (C. A. 3d Cir.) (Pennsylvania prohibition of garnishment of future debts of garnishee to debtor).

[32] In Texas, the value of the homestead that is exempt from execution is $5,000, as of the time of its designation as a homestead and without reference to the value of any improvements, Tex. Rev. Civ. Stat. Ann. Art. 3833; Tex. Const. Art. 16, §§ 50, 51. In Tennessee and Maine, the homestead exemption is $1,000, Tenn. Const. Art. 11, § 11; Me. Rev. Stat. Ann. Tit. 14, §§ 4551, 4552; in California, it is $15,000 for the head of a family, $7,500 for all others, Cal. Civ. Code §§ 1240, 1260 (Supp. 1964); cf. Cal. Const. Art. 17, § 1. If Mrs. Yazell's separate property were a homestead under Texas law, she might have been able to defeat execution on the judgment that might have been entered against her in this suit to a far greater degree than some other debtor to the SBA could who happened to

Generally, in the cases applying state law to limit or condition the enforcement of a federal right, the Court has insisted that the state law is being "adopted" as the federal rule. Even so, it has carefully pointed out that this theory would make it possible to "adopt," as the

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reside in Tennessee or Maine; and a Californian would do even better than Mrs. Yazell.

Other exemptions from execution vary similarly. For example, Texas, Maine and California provide for detailed personal exemptions. In Texas, a family is exempt not only as to its homestead, but also its furniture, cemetery lot, implements of husbandry, tools and books of a trade, family library and pictures, five cows and their calves, two mules, two horses, one wagon, one carriage, one gun, 20 hogs, 20 sheep, harness, provisions and forage for home consumption, current wages, clothing, 20 goats, 50 chickens, 30 turkeys, 30 ducks, 30 geese, 30 guineas, and one dog. A somewhat less extensive list is provided for persons who are not constituents of a family. Tex. Rev. Civ. Stat. Ann. Art. 3832, 3835. Cf. also Me. Rev. Stat. Ann. Tit. 14, § 4401; Cal. Civ. Proc. Code §§ 690–690.52 (1955 ed. and Supp. 1964). Texas also has other special protections, including a provision applicable to ferrymen, saving to them their ferryboat and tackle, Tex. Rev. Civ. Stat. Ann. Art. 3836.

[33] Rule 64, adopting state provisional remedies for security in advance of judgment, can lead to the same kind of diversity as does Rule 69. Cf. *De Beers Consolidated Mines, Ltd.* v. *United States,* 325 U. S. 212. State provisional remedies vary greatly. See 7 Moore's Fed. Prac. ¶ 64.04 [3].

operative "federal" law, differing laws in the different States, depending upon the State where the relevant transaction takes place.[34]

Although it is unnecessary to decide in the present case whether the Texas law of coverture should apply *ex proprio vigore*—on the theory that the contract here was made pursuant and subject to this provision of state law—or by "adoption" as a federal principle, it is clear that the state rule should govern. There is here no need for uniformity. There is no problem in complying with state law; in fact, SBA transactions in each State are specifically and in great detail adapted to state law.[35]

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[34] "In our choice of the applicable federal rule we have occasionally selected state law." *Clearfield Trust Co.* v. *United States,* 318 U. S. 363, 367. The Court observed in *Clearfield* that the difficulty of determining which state rule to apply could be a persuasive argument in favor of a federal rule. *Ibid.* No such difficulty exists here, of course.

In *Royal Indemnity Co.* v. *United States,* 313 U. S. 289, cited by the Government for the proposition that "the rights of the United States under contracts entered into as part of an authorized nationwide program are to be determined by federal and not by State law," Brief for the United States, p. 7, the Court, while insisting that "the rule governing the interest to be recovered as damages for delayed payment of a contractual obligation to the United States is not controlled by state statute or local common law," 313 U. S., at 296, nonetheless held that the statutory rate prevailing in the State where the obligation was undertaken and to be performed was a suitable one for adoption by the federal courts. Cf. also *Board of Commissioners* v. *United States,* 308 U. S. 343.

[35] The Financial Assistance Manual of the Small Business Administration, SBA-500, is replete with admonitions to follow state law carefully. Thus § 401.03 reads:

"*Compliance with Applicable Laws.* When the United States disburses its funds, it is exercising a constitutional function or power and its rights and duties are governed by Federal rather than local law. However, it is frequently necessary, in the obtaining of a marketable title or enforceable security interest in property, to follow

There is in this case no defensible reason to override state law unless, despite the contrary indications in *Fink* v. *O'Neil* and elsewhere as has been set forth, we are to take the position that the Federal Government is entitled to collect regardless of the limits of its contract and regardless of any state laws, however local and peculiarly domestic they may be.

The decision below is

Affirmed.

MR. JUSTICE HARLAN, concurring.

I join the Court's opinion with a single qualification, namely, that I place no reliance on any of the particularities of the negotiations between the parties respecting this loan. In my view the conclusion that Texas law governs the issue before us is amply justified by the Court's appraisal of the competing state and federal interests at stake, irrespective of whether the parties negotiated with specific reference to Texas law.

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local procedural requirements and statutes. Accordingly, care should be used in following or meeting all applicable requirements and statutes of the State in which the property is located, including the filing and refiling, recording and re-recording of any documents." See also, *e. g.*, §§ 401.06, 402.04, 403.03, 404.01, 404.02, 406.02, 407.03, 407.04 ("State laws vary as to the dominion a lender must exercise over assigned accounts receivable. . . . In drafting servicing provisions . . . counsel should carefully consider the applicable laws of the State . . . ."), 408.01, 410.08 ("In order to guard against this Agency's liability for payment of insurance premiums under the standard mortgagee clause in any state the law of which . . . makes the mortgagee so liable, the regional director shall . . . ."), 706.01. Section 1008.03 authorizes a Regional Director of SBA, "In instances where a disaster area is distantly located from the Regional office and where speed and economy of administration make such procedure advisable," to recommend to the General Counsel that "local counsel be appointed and that he be authorized to rely on such counsel for all legal matters and closing opinions." See, in addition, 13 CFR (1965 Supp.) § 122.17.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE WHITE join, dissenting.

Because I think the dissenting opinion of Judge Prettyman in the Court of Appeals gives a more accurate picture of the relevant facts and issues in this case than does the opinion of the Court, and because I agree with the legal conclusion Judge Prettyman reached for the reasons he gave, I set out his dissent below and adopt it as my own.

> "Mrs. Yazell and her husband, trading as a partnership, borrowed money from the Federal Government through the Small Business Administration. They signed a note for the loan. They also signed, as security for the loan, a chattel mortgage on the merchandise in their store. They could not pay, and the Government foreclosed on the security. A deficiency remained. The Government sued on the note, praying judgment for the balance of the loan. Mrs. Yazell moved for summary judgment on the ground that she is a married woman and so, in Texas, no personal judgment and no judgment affecting her separate estate can be rendered against her, with a few exceptions not here material. The District Court judge agreed with her, and so do my brethren on this court. I am contrari-minded.
>
> "A loan from the Federal Government is a federal matter and should be governed by federal law. There being no federal statute on the subject, the courts must fashion a rule. This is the clear holding of Clearfield Trust Co. v. United States.[1]
>
> "To effectuate the policy of the Small Business Act, loans of many hundreds of thousands of dollars each year to businesses must be made throughout the country. These loans can be made only under

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"[1] 318 U.S. 363 . . . (1943)."

conditions which will reasonably assure repayment.[2] I think the Act should be of uniform application throughout the country. If local rules are to govern federal contracts in respect to the capacity of married women to contract, so too should local rules as to all other features of contractual capacity govern such contracts. Chaos which would nullify federal programs for disaster relief would arise. And of course there is no reason to restrict this decision to loans under the Small Business Act. It would necessarily apply with equal force to every other federal program which involves contracts between the Federal Government and individuals. A multitude of programs will be frustrated by it.

"It seems to me that, if a person has capacity to get money from the Federal Government, he has the capacity to give it back. The present lawsuit does not involve a general liability for debt; it involves merely the obligation to repay to the Government specific money borrowed from the Government. It seems to me that if a person borrows a horse from a neighbor he ought to be required to give it back if the owner wants it back, whether or not the borrower is a married woman. I suppose the Texas law, by nullifying repayments by married women, tends to minimize ill-advised borrowing. But I think the federal rule ought to be that you must repay what you borrow.

"It seems to me that United States v. Helz [3] was correctly decided by the Sixth Circuit and that it applies here. I would follow it." 334 F. 2d 454, 456.

"[2] 15 U.S.C. § 636(a)(7); 13 C.F.R. § 120.4-2(c) (1958)."

"[3] 314 F.2d 301 (1963)."

Though I think that Judge Prettyman's dissent is enough to justify his rejection of the Texas law of "coverture" as a part of federal law, I consider it appropriate to add another reason, which in itself would be enough for me. The Texas law of "coverture," which was adopted by its judges and which the State's legislature has now largely abandoned, rests on the old common-law fiction that the husband and wife are one. This rule has worked out in reality to mean that though the husband and wife are one, the one is the husband. This fiction rested on what I had supposed is today a completely discredited notion that a married woman, being a female, is without capacity to make her own contracts and do her own business. I say "discredited" reflecting on the vast number of women in the United States engaging in the professions of law, medicine, teaching, and so forth, as well as those engaged in plain old business ventures as Mrs. Yazell was. It seems at least unique to me that this Court in 1966 should exalt this archaic remnant of a primitive caste system to an honored place among the laws of the United States.

KOEHRING CO. *v.* HYDE CONSTRUCTION CO., INC., ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

No. 593. Decided January 17, 1966.

On March 10, 1964, the Court of Appeals for the Fifth Circuit issued an order stating that the District Court for the Southern District of Mississippi had erred in failing to comply with an earlier order to transfer the case to the District Court for the Northern District of Oklahoma and that pending physical transfer of the record "this order shall constitute a transfer to enable the parties to present the matter to the District Court of Oklahoma." The Oklahoma federal court assumed jurisdiction the next day and entered an order temporarily restraining respondents from proceeding with a state court trial in Mississippi. Respondents disregarded the restraining order and on March 14 the Oklahoma federal court found them in civil contempt. Respondents continued with the state action and obtained a judgment against petitioner the enforcement of which the Oklahoma federal court enjoined, ordering a retrial in federal court in Oklahoma. The Court of Appeals for the Tenth Circuit reversed this decree on appeal, holding that the Oklahoma federal court lacked jurisdiction at the time it entered the original restraining order since it had not yet received the case file from the transferor court. *Held:* The Oklahoma District Court acquired jurisdiction on March 11 in accordance with the Fifth Circuit's order and the Tenth Circuit erred in vacating the District Court's orders on the stated jurisdictional ground. The provision in 28 U. S. C. § 1404 (a) that "a district court may transfer any civil action" does not preclude transfer by direct order of an appellate court where unusual circumstances, such as existed here, indicate the necessity thereof.

Certiorari granted; 348 F. 2d 643, reversed and remanded.

Steven E. Keane for petitioner.

Charles Clark for respondents.

PER CURIAM.

On March 11, 1964, pursuant to a transfer order issued by the Court of Appeals for the Fifth Circuit, the United States District Court for the Northern District of Oklahoma entered an order temporarily restraining respondents from proceeding with trial of a case in the Mississippi state courts. When respondents, in disregard of the temporary restraining order, proceeded to trial in Mississippi, the District Court on March 14 found them in civil contempt.[1] Undeterred, respondents pressed the state court action to a conclusion and obtained a judgment against petitioner on April 8. But the District Court, on September 1, enjoined respondents from seeking to enforce the Mississippi judgment, required them to compensate petitioner for reasonable expenses in connection with the contempt proceeding, reserved decision as to whether they must also reimburse petitioner for expenses relating to the Mississippi litigation, and ordered the civil suit between the parties retried—this time in Oklahoma and in federal court.

Respondents appealed from this decree to the Court of Appeals for the Tenth Circuit which reversed, holding that at the time the District Court had entered the original restraining order it was without jurisdiction since it had not yet received the case file from the transferor court. We are asked to review that determination. We grant the petition and reverse.

The District Court had assumed jurisdiction of the cause and entered its restraining order on March 11, five days before the papers in the case were transferred to it from Mississippi. It acted upon the basis of a certified copy of an order entered the previous day by the Court of Appeals for the Fifth Circuit. That order provided not only that the District Court for the Southern District of Mississippi had erred in failing to comply with an earlier appellate mandate to transfer the case, but also that "pending the entry of the order of transfer by the District Judge and the physical filing of the record in Oklahoma, this order shall constitute a transfer to enable the parties to present the matter to the District Court of Oklahoma."

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[1] Criminal contempt charges were also filed, but are not involved in the present petition.

Although a federal appellate court does not ordinarily itself transfer a case to another district, but remands to the District Court for that purpose,[2] the extraordinary action in this case was taken as a result of extraordinary circumstances. These included the fact that the Federal District Court in Mississippi had granted a motion to dismiss despite instructions from the Fifth Circuit to transfer the cause to Oklahoma,[3] and the further fact that trial of a duplicative action in the Mississippi state courts brought by respondent Hyde Construction Company was to commence, and did in fact commence, on March 11—one day after the Fifth Circuit's *instanter* transfer and the very day on which the Federal District Court in Oklahoma entered its order.

In the special circumstances of this case, we conclude that the District Court in Oklahoma had acquired jurisdiction on March 11 in accordance with the Fifth Circuit's order for *instanter* transfer and that the Tenth Circuit erred in vacating the District Court's orders on the stated jurisdictional ground. We do not read 28 U. S. C. § 1404 (a), providing that "a district court may transfer any civil action," as precluding an appellate court, where unusual circumstances indicate the necessity thereof, from effecting a transfer by direct order.[4]

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[2] Cf. *Platt* v. *Minnesota Mining Co.*, 376 U. S. 240 (under Rule 21 (b) of the Federal Rules of Criminal Procedure).

[3] The Fifth Circuit suggests that the District Court's action was the result of misunderstanding over whether an answer had been filed and hence of its duty to grant a voluntary dismissal under Rule 41 (a)(1) of the Federal Rules of Civil Procedure, rather than the result of unreadiness to respect appellate instructions.

Accordingly, we grant the petition, reverse the judgment, and remand to the District Court for the Northern District of Oklahoma for further proceedings consistent with this opinion, reserving to the parties the right to apply to that court to have the case transferred back to the Southern District of Mississippi because of changed conditions.[5]

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, dissenting.

I think, as shown by the record and the carefully prepared opinions of the able judges in both the Fifth and the Tenth Circuits, that the circumstances of this case are both too complex and obscure, and the issues which concern among other things the relationship between state and federal courts and the transfer of cases between federal courts are all too important to be treated in the cursory manner as they are by the Court here. This Court's reversal of the judgment below, without giving respondents any opportunity for oral argument to support the thoroughly considered opinion and holding of the Tenth Circuit, seems more extraordinary to me than what the Court's *per curiam* opinion refers to as the "extraordinary circumstances" in the courts below. I dissent from that course of action taken by this Court.

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[4] *Drabik* v. *Murphy*, 246 F. 2d 408 (C. A. 2d Cir.), is not authority for the proposition that the transferee court fails to acquire jurisdiction until papers are received from the transferor court. On the contrary, *Drabik* suggests that the transferor court may lose jurisdiction before that event.

[5] This reservation was made in the opinion of the Fifth Circuit.

INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL-CIO *v.* NATIONAL LABOR RELATIONS BOARD ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 87. Decided January 17, 1966.

Certiorari granted; judgments vacated and remanded.

Irving Abramson, Benjamin C. Sigal and *Winn I. Newman* for petitioner.

Solicitor General Cox, Arnold Ordman, Dominick L. Manoli, Norton J. Come and *Laurence S. Gold* for National Labor Relations Board, and *David L. Benetar* and *Sanford Browde* for General Electric Co., respondents.

PER CURIAM.

The petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, the judgments are vacated and the case is remanded to that court for further consideration in light of *Automobile Workers* v. *Scofield, ante,* p. 205.

LLOYD *v.* BRICK ET AL.

APPEAL FROM THE COURT OF APPEALS OF MARYLAND.

No. 679. Decided January 17, 1966.

Appeal dismissed and certiorari denied.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

ALTIERE *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 100. Decided January 17, 1966.

Certiorari granted; 343 F. 2d 115, vacated and remanded.

Anna R. Lavin and *Maurice J. Walsh* for petitioner.

Solicitor General Cox for the United States.

PER CURIAM.

In the light of the suggestion of the Solicitor General and an independent examination of the record, the petition for a writ of certiorari is granted, the judgment is vacated, and the case is remanded to the United States District Court for the Northern District of Illinois for further proceedings in light of *Sansone* v. *United States*, 380 U. S. 343.

SMITH ET AL. *v.* AYRES, MAYOR, ET AL.

APPEAL FROM THE SUPREME COURT OF FLORIDA.

No. 690. Decided January 17, 1966.

174 So. 2d 727, appeal dismissed and certiorari denied.

Robert J. Corber for appellants.

Wallace E. Sturgis, Jr., for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

PENNSYLVANIA RAILROAD CO. ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 556. Decided January 17, 1966.

Affirmed.

Paul R. Duke and *Edward A. Kaier* for appellants.

Solicitor General Marshall, Assistant Attorney General Turner, Robert B. Hummel, Neil Brooks, Robert W. Ginnane and *I. K. Hay* for the United States et al. *Leo A. Larkin, Samuel Mandell, Sidney Goldstein, F. A. Mulhern, Arthur L. Winn, Jr., Samuel H. Moerman, J. Raymond Clark* and *James M. Henderson* for appellee Port of New York Authority.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.

ATLANTIC GULF & PACIFIC CO. *v.* GEROSA, COMPTROLLER OF THE CITY OF NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 718. Decided January 17, 1966.

16 N. Y. 2d 1, 209 N. E. 2d 86, appeal dismissed.

Richard H. Appert for appellant.

Leo A. Larkin, Stanley Buchsbaum and *Samuel J. Warms* for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

NATIONAL BUS TRAFFIC ASSOCIATION, INC., ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 635. Decided January 17, 1966.

Affirmed.

Robert J. Bernard, *Drew L. Carraway*, *John S. Fessenden* and *Richard R. Sigmon* for appellants.

Solicitor General Marshall, *Assistant Attorney General Turner*, *Robert B. Hummel*, *Robert W. Ginnane* and *Leonard S. Goodman* for the United States et al.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.

GREAT COASTAL EXPRESS, INC., ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA.

No. 677. Decided January 17, 1966.

243 F. Supp. 943, affirmed.

John C. Bradley for appellants.

Solicitor General Marshall, *Assistant Attorney General Turner*, *Robert B. Hummel*, *Jerry Z. Pruzansky* and *Robert W. Ginnane* for the United States et al. *Francis W. McInerny* for Turner's Express, Inc., et al., appellees.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.

NORTHWESTERN PACIFIC RAILROAD CO. *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 676. Decided January 17, 1966.

Appeal dismissed.

Thormund A. Miller, Jeremiah C. Waterman and *Randolph Karr* for appellant.

Mary Moran Pajalich and *Hector Anninos* for appellee.

Boris H. Lakusta for the City of San Rafael et al.

PER CURIAM.

The motion of the City of San Rafael, California, et al. for leave to be named parties appellee is denied. The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

SCHILDHAUS *v.* ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 732. Decided January 17, 1966.

Appeal dismissed and certiorari denied.

Arnold Schildhaus, appellant, *pro se.*

John G. Bonomi and *Michael Franck* for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

CONVOY CO. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON.

No. 719. Decided January 17, 1966.

Affirmed.

Marvin Handler and *Moe M. Tonkon* for appellant.

Solicitor General Marshall, Assistant Attorney General Turner, Robert B. Hummel, Robert W. Ginnane, I. K. Hay and *Betty Jo Christian* for the United States et al. *Donald W. Smith* for Commercial Carriers, Inc., appellee.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.

JOHN *v.* JOHN.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 699. Decided January 17, 1966.

16 N. Y. 2d 675, 210 N. E. 2d 457, appeal dismissed and certiorari denied.

Warner Pyne for appellant.

Irwin L. Germaise for appellee.

PER CURIAM.

The motion to dispense with printing the motion to dismiss or affirm is granted.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 510. Decided January 17, 1966.*

242 F. Supp. 890, affirmed.

Peter T. Beardsley, Richard R. Sigmon, Bryce Rea, Jr., and *Ralph C. Busser, Jr.,* for appellants in No. 510. *Carl Helmetag, Jr.,* for appellant in No. 511.

Solicitor General Marshall, Assistant Attorney General Turner, Lionel Kestenbaum and *Robert W. Ginnane* for the United States et al. *John F. Donelan* and *John M. Cleary* for National Industrial Traffic League, appellee in both cases. *Joseph E. Keller* and *W. H. Borghesani, Jr.,* for South Paterson Trucking Co., Inc., et al.; and *William A. Goichman* and *Joseph C. Bruno* for Pennsylvania Public Utility Commission, appellees in No. 511.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.

MR. JUSTICE BLACK and MR. JUSTICE HARLAN are of the opinion that probable jurisdiction should be noted.

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*Together with No. 511, *Pennsylvania Railroad Co.* v. *United States et al.,* also on appeal from the same court.

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

No. 662. Decided January 17, 1966.

242 F. Supp. 597, affirmed.

Peter T. Beardsley, Richard R. Sigmon and *Harry C. Ames, Jr.*, for appellants.

Solicitor General Marshall, Assistant Attorney General Turner, Robert B. Hummel, Robert W. Ginnane and *Betty Jo Christian* for the United States et al. *William M. Moloney, Hugh B. Cox, William H. Allen* and *James A. Bistline* for Atchison, Topeka & Santa Fe Railway Co. et al., appellees.

PER CURIAM.

The motion of the Atchison, Topeka & Santa Fe Railway Company et al. to be added as parties appellee is granted.

The motions to affirm are granted and the judgment is affirmed.

NEWSPAPER DRIVERS & HANDLERS LOCAL UNION NO. 372, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, INC. *v.* DETROIT NEWSPAPER PUBLISHERS ASSOCIATION ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 663. Decided January 17, 1966.

Certiorari granted; 346 F. 2d 527, judgments vacated and remanded.

David Previant for petitioner.

Philip T. Van Zile II for Detroit Newspaper Publishers Association et al.; and *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for National Labor Relations Board, respondents.

PER CURIAM.

The petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted, the judgments are vacated and the case is remanded to that court with instructions that the case be remanded to the National Labor Relations Board for further consideration in light of *American Ship Building Co.* v. *Labor Board,* 380 U. S. 300.

SEGAL, DBA SEGAL COTTON PRODUCTS, ET AL. *v.* ROCHELLE, TRUSTEE IN BANKRUPTCY.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 44. Argued November 17, 1965.—Decided January 18, 1966.

On September 27, 1961, the individual petitioners and their business partnership filed bankruptcy petitions. After the end of that year loss-carryback federal income tax refunds were obtained for the individual petitioners based on the firm's losses during 1961 prior to bankruptcy which were offset against income for 1959 and 1960 on which taxes had been paid. These refunds, on deposit in a special account by the bankruptcy trustee, are claimed by petitioners on the ground that bankruptcy had not passed the refund claims to the trustee. The referee ruled against petitioners, as did the District Court and the Court of Appeals, the latter holding that the loss-carryback refund claims were both "property" and "transferable" at the time of the bankruptcy petition and thus had passed to the trustee. *Held:*

1. These inchoate claims for loss-carryback refunds constituted "property" as that term is used in § 70a (5) of the Bankruptcy Act. Pp. 379–381.

(a) The classification as "property" is governed by the purposes of the Act. P. 379.

(b) The main thrust of § 70a (5) being to obtain for creditors everything of value possessed by the bankrupt in alienable form at the time the petition was filed, the term "property" has been generously construed and does not exclude interests which are novel or contingent or where enjoyment must be postponed. P. 379.

(c) The term is limited by another purpose of the Act, which is to leave the bankrupt free after the date of the petition to acquire new wealth. P. 379.

(d) The loss-carryback refund claim is sufficiently rooted in the prebankruptcy past and so little enmeshed with the bankrupt's ability to make an unencumbered new start that it should be regarded as "property" under § 70a (5). P. 380.

2. The refund claims were property which prior to filing the petition could have been "transferred" within the meaning of § 70a (5). Pp. 381–385.

(a) The Assignment of Claims Act, 31 U. S. C. § 203, does not always prevent giving effect, between the parties, to a noncomplying transfer, *Martin* v. *National Surety Co.*, 300 U. S. 588. P. 384.

(b) In Texas, where the petitioners resided and did business, the precedents leave little doubt that an assignment of the refund claims would normally be enforced in equity between the parties. Pp. 384–385.

336 F. 2d 298, affirmed.

Henry Klepak argued the cause and filed a brief for petitioners.

William J. Rochelle, Jr., argued the cause *pro se*. With him on the brief was *Marvin S. Sloman*.

Mr. Justice Harlan delivered the opinion of the Court.

This case, presenting a difficult question of bankruptcy law on which the circuits have differed, arises out of the following facts. On September 27, 1961, voluntary bankruptcy petitions were filed in a federal court in Texas by Gerald Segal, Sam Segal, and their business partnership, Segal Cotton Products. A single trustee, Rochelle, was designated to serve in all three proceedings. After the close of that calendar year, loss-carryback tax refunds were sought and obtained from the United States on behalf of Gerald and Sam Segal under Internal Revenue Code § 172. The losses underlying the refunds had been suffered by the partnership during 1961 prior to the filing of the bankruptcy petitions; the losses were carried back to the years 1959 and 1960 to offset net income on which the Segals had both paid taxes. By agreement, Rochelle deposited the refunds in a special account, and the Segals applied to the referee in bankruptcy to award the refunds to them on the ground that bankruptcy had not passed the refund claims to the trustee.

Concluding that the refund claims had indeed passed under § 70a (5) of the Bankruptcy Act[1] as "property . . . which prior to the filing of the petition . . . [the bankrupt] could by any means have transferred," the referee denied the Segals' application. The District Court affirmed the denial, and the Segals and their partnership appealed to the Court of Appeals for the Fifth Circuit.[2] That court too rejected the Segals' contention.

As the Court of Appeals here recognized, the Court of Appeals for the First Circuit in *Fournier* v. *Rosenblum,* 318 F. 2d 525, and the Court of Appeals for the Third Circuit in *In re Sussman,* 289 F. 2d 76, have both ruled squarely that a bankrupt's loss-carryback refund claims based on losses in the year of bankruptcy do not pass to the trustee but instead the bankrupt is entitled to the refunds when they are ultimately paid. Concededly, under § 70a (5) the trustee must acquire the bankrupt's "property" as of the date the petition is filed and property subsequently acquired belongs to the bankrupt. See note 1, *supra;* 4 Collier, Bankruptcy ¶ 70.09 (14th ed. 1962). Since the tax laws allow a loss-carryback refund claim to be made only when the year has closed, see I. R. C. §§ 172 (a), (c), 6411, both the First and Third Circuits reasoned that prior to the year's end a loss-carryback refund claim was too tenuous to be classed as "property" which would pass under § 70a (5). Alternatively, the Third Circuit stated that because of the federal anti-assignment statute,[3] inchoate refund claims were not in any event property "which prior to the filing of the petition . . . [the bankrupt] could by any means have transferred," as § 70a (5) also requires. Both circuits felt the result to be unfortunate, not least because the very losses generating the refunds often help precipitate the bankruptcy and injury to the creditors, but both believed the statutory language left no option.

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[1] 30 Stat. 565, as amended, 11 U. S. C. § 110 (a)(5) (1964 ed.). In relevant part that section provides: "(a) The trustee of the estate of a bankrupt . . . shall . . . be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this title, except insofar as it is to property which is held to be exempt, to all of the following kinds of property wherever located . . . (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered . . . ."

[2] The wife of Gerald Segal and the estate of the deceased wife of Sam Segal had unsuccessfully urged before the referee their own contingent rights to half the refunds, but review on this issue was not sought.

After detailed discussion of the problems, the Court of Appeals in this case resolved that the loss-carryback refund claims were both "property" and "transferable" at the time of the bankruptcy petition and hence had passed to the trustee. 336 F. 2d 298. We granted certiorari because of the conflict and the significance of the issue in bankruptcy administration.[4] 380 U. S. 931.

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[3] Rev. Stat. § 3477, as amended, 31 U. S. C. § 203 (1964 ed.). The section, so far as relevant, states: "All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor . . . shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof."

[4] Considerable commentary has been directed to the problem. Practically all the writers agree that it is desirable for the trustee to receive the refunds although a minority contend that existing law will not permit this result. See Herzog, Bankruptcy Law—Modern Trends, 36 Ref. J. 18 (1962); 60 Nw. U. L. Rev. 122 (1965); 40 Notre Dame Law. 118 (1964); 14 Stan. L. Rev. 380 (1962); 40 Tex. L. Rev. 569 (1962); 42 Tex. L. Rev. 542 (1964); 17 U. Fla. L. Rev. 241 (1964); 16 U. Miami L. Rev. 345 (1961); 110 U. Pa. L. Rev. 275 (1961).

Conceding the question to be close, we are persuaded by the reasoning of the Fifth Circuit and we affirm its decision.

I.

We turn first to the question whether on the date the bankruptcy petitions were filed, the potential claims for loss-carryback refunds constituted "property" as § 70a (5) employs that term. Admittedly, in interpreting this section "[i]t is impossible to give any categorical definition to the word 'property,' nor can we attach to it in certain relations the limitations which would be attached to it in others." *Fisher* v. *Cushman,* 103 F. 860, 864. Whether an item is classed as "property" by the Fifth Amendment's Just-Compensation Clause or for purposes of a state taxing statute cannot decide hard cases under the Bankruptcy Act, whose own purposes must ultimately govern.

The main thrust of § 70a (5) is to secure for creditors everything of value the bankrupt may possess in alienable or leviable form when he files his petition. To this end the term "property" has been construed most generously and an interest is not outside its reach because it is novel or contingent or because enjoyment must be postponed. *E. g., Horton* v. *Moore,* 110 F. 2d 189 (contingent, postponed interest in a trust); *Kleinschmidt* v. *Schroeter,* 94 F. 2d 707 (limited interest in future profits of a joint venture); see 3 Remington, Bankruptcy §§ 1177–1269 (Henderson ed. 1957). However, limitations on the term do grow out of other purposes of the Act; one purpose which is highly prominent and is relevant in this case is to leave the bankrupt free after the date of his petition to accumulate new wealth in the future. Accordingly, future wages of the bankrupt do not constitute "property" at the time of bankruptcy nor, analogously, does an intended bequest to him or a promised gift—even though state law might permit all of these to be alienated in advance. *E. g., In re Coleman,* 87 F. 2d 753; see 4 Collier, Bankruptcy ¶¶ 70.09, 70.27 (14th ed. 1962). Turning to the loss-carryback refund claim in this case, we believe it is sufficiently rooted in the pre-bankruptcy past and so little entangled with the bankrupts' ability to make an unencumbered fresh start that it should be regarded as "property" under § 70a (5).

Temporally, two key elements pointing toward realization of a refund existed at the time these bankruptcy petitions were filed: taxes had been paid on net income within the past three years, and the year of bankruptcy at that point exhibited a net operating loss. The Segals stress in this Court that under the statutory scheme no refund could be claimed from the Government until the end of the year, but as cases already cited indicate, postponed enjoyment does not disqualify an interest as "property." That earnings by the bankrupt after filing the petition might diminish or eliminate the loss-carryback refund claim does further qualify the interest, but we have already noted that contingency in the abstract is no bar and the actual risk that the refund claims may be erased is quite far from a certainty.[5] Unlike a pre-bankruptcy promise of a gift or bequest, passing title to the trustee does not make it unlikely the gift or bequest will be effected. Nor does passing the claim hinder the bankrupt from starting out on a clean slate, for any administrative inconvenience to the bankrupt will not be prolonged, see 110 U. Pa. L. Rev., at 279-280, and the bankrupt without a refund claim to preserve has more reason to earn income rather than less.

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[5] So far as losses by the bankrupt after filing but before the year's end might increase the refund—a situation not claimed to be present in this case—the Court of Appeals suggested "[a] proration of the refund in the ratio of the losses before and after the filing date would be indicated . . . ." 336 F. 2d, at 302, n. 5.

We are told that if this loss-carryback refund claim is "property," that label must also attach to loss-carryovers, that is, the application of pre-bankruptcy losses to earnings in future years. Since losses may be carried forward five years and in some cases even seven or ten years, I. R. C. §§ 172 (b)(1)(B)–(D), great hardship for the estate is foreseen by petitioners in keeping it open for this length of time. While in fact the trustee can obviate this detriment to the estate—by selling a contingent claim in some instances or simply forgoing it—inconvenience and hindrance might be caused for the bankrupt individual. Without ruling in any way on a question not before us, it is enough to say that a carryover into post-bankruptcy years can be distinguished conceptually as well as practically. The bankrupts in this case had both prior net income and a net loss when their petitions were filed and apparently would have deserved an immediate refund had their tax year terminated on that date; by contrast, the supposed loss-carryover would still need to be matched in some future year by earnings, earnings that might never eventuate at all.

II.

Having concluded that the loss-carryback refund claims in this case constituted "property" at the time of the bankruptcy petitions, it remains for us to decide whether in addition they were property "which prior to the filing of the petition . . . [the bankrupt] could by any means have transferred . . . ."[6] The prime obstacle to an affirmative answer is 31 U. S. C. § 203, which renders "absolutely null and void" all transfers of any claim against the United States unless among other conditions the claim has been allowed and the amount ascertained. See n. 3, *supra.* Plainly since the tax laws calculate the refund only on the full year's experience after the year has closed, the claims in the present instance could not have been allowed or ascertained at the time the petitions were filed.

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[6] The "choice of law" rules relevant to this question are not in dispute. What would constitute a "transfer" is a matter of federal law. 4 Collier, Bankruptcy ¶ 70.15, at 1035–1036 and n. 25 (14th ed. 1962). Whether an item could have been so transferred is determined generally by state law, save that on rare occasions overriding federal law may control this determination or bear upon it. *Id.,* at 1034–1035 and n. 22. The Segals were Texas residents, the business was apparently based in Texas, and the bankruptcy court was located there; no other State's law is claimed to be relevant.

The respondent argues that the transferability requirement of § 70a (5) can be met by relying on the long-established rule that § 203 does not apply to prevent transfers by "operation of law." See *United States* v. *Aetna Surety Co.,* 338 U. S. 366, 373–374; *Goodman* v. *Niblack,* 102 U. S. 556, 560.[7] The phrasing of § 70a (5), however, suggests that it contemplates a voluntary transfer and is not satisfied simply because property could have been transferred by operation of law, such as by death, bankruptcy, or judicial process. Not only is there practically no form of property that would not be transferable under the broader reading, but such a reading also makes redundant the alternative route for complying with § 70a (5) through showing that the property "might have been levied upon and sold under judicial process . . . ."[8] Admittedly, the Bankruptcy Act defines the word "transfer" in its general definitional section to include at least certain transfers that are "involuntary,"[9] but legislative history indicates that the introduction of this latter term into the Act 40 years after its framing was not aimed at § 70a (5) at all. See H. R. Rep. No. 1409, 75th Cong., 1st Sess., p. 5; Analysis of H. R. 12889, 74th Cong., 2d Sess., p. 7 (House Judiciary Comm. Print).

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[7] This exception is the simplest reason why § 203 does not interfere with the vesting in the trustee of property coming within § 70a (5), for all transfers under § 70a are explicitly by "operation of law," see n. 1, *supra;* but of course property must still qualify as transferable within the meaning of § 70a (5).

[8] See n. 1, *supra.* The respondent has not argued that under Texas law the Segals' inchoate refund claims would be subject to such judicial process, and apparently in Texas the claims' contingent status would render this argument quite doubtful. See 26 Tex. Jur. 2d, Garnishment § 17 (1961), and cases there cited.

Difficulty in defining the term "transfer" is enhanced by the absence of any explanation for Congress' having made transferability a condition in the first place. Bankruptcy Acts prior to the present one enacted in 1898 had no like limitation on the trustee's succession to property, see Bankruptcy Acts of 1867, § 14, 14 Stat. 522; of 1841, § 3, 5 Stat. 442; and of 1800, §§ 5, 13, 2 Stat. 23, 25, and under the predecessor Act claims against the Government passed without impediment to the trustee. See, *e. g., Erwin* v. *United States,* 97 U. S. 392. This history and the chance that the 1898 limitation sought only to respect state policies against alienating property such as a contingent remainder or spendthrift trust fund argue for flatly ignoring the limitation in this instance. See 14 Stan. L. Rev., at 383-386. Nevertheless, we have been shown no legislative history on the point, and an uncertain guess at Congress' intent provides dubious ground for disregarding its plain language. In any event, we are not prepared to accept this argument, just as we cannot now go beyond a narrow definition of the term "transfer," in a case in which these points have not been thoroughly briefed by the parties.

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[9] Bankruptcy Act § 1 (30), as amended by the Chandler Act, 52 Stat. 842, as amended, 11 U. S. C. § 1 (30) (1964 ed.), pertinently reads: " 'Transfer' shall include the sale and every other and different mode, direct or indirect, of disposing of or of parting with property or with an interest therein or with the possession thereof or of fixing a lien upon property or upon an interest therein, absolutely or conditionally, voluntarily or involuntarily, by or without judicial proceedings, as a conveyance, sale, assignment, payment, pledge, mortgage, lien, encumbrance, gift, security, or otherwise . . . ."

The Court of Appeals determined that despite § 203 a sufficient voluntary transfer of the loss-carryback refund claim could have been made prior to bankruptcy to satisfy § 70a (5), and on balance we share this view. In *Martin* v. *National Surety Co.,* 300 U. S. 588, 596, a unanimous Court held that § 203, in spite of its broad language, "must be interpreted in the light of its purpose to give protection to the Government" so that between the parties effect might still be given to an assignment that failed to comply with the statute. The opinion reasoned that after claims have been collected by the assignor, requiring compliance with the invalid assignment by transfer of the recovery to the assignee presented no danger that the Government might become "embroiled in conflicting claims, with delay and embarrassment and the chance of multiple liability." 300 U. S., at 594. While other circumstances encouraged *Martin* to uphold the assignment and this Court has not faced the problem head-on since that time, we find no reason to retreat now from the basic holding in *Martin* which was both anticipated and followed by a number of other courts, state and federal. See *California Bank* v. *United States Fid. & Guar. Co.,* 129 F. 2d 751; *Royal Indem. Co.* v. *United States,* 93 F. Supp. 891; *Leonard* v. *Whaley,* 91 Hun 304, 36 N. Y. Supp. 147; Ann., 12 A. L. R. 2d 460, 468–475 (1950). Among these States is Texas, whose precedents leave little doubt that an assignment of the claims at issue would be enforced in equity in the normal case. *Trinity Univ. Ins. Co.* v. *First State Bank,* 143 Tex. 164, 183 S. W. 2d 422; see *United Hay Co.* v. *Ford,* 124 Tex. 213, 76 S. W. 2d 480 (dictum).

It should not be pretended that this contemplated "transfer" is one in the fullest sense that term permits. For example, this Court has ruled that one holding a claim invalidly assigned under § 203 may not sue the Government upon it though he join his assignor as well.

United States v. *Shannon,* 342 U. S. 288. Yet it remains true that a Texas court of equity could and would compel the assignment of any refund received, if indeed it might not try to compel a reluctant assignor to collect the claim or make it over by a valid assignment when that became possible. This, we believe, suffices to make the Segals' claims transferable within the meaning of § 70a (5). Cf. 4 Collier, Bankruptcy ¶ 70.37, at 1293, n. 6 (14th ed. 1962).

Affirmed.

CALIFORNIA *v.* BUZARD.

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 40. Argued November 16, 1965.—Decided January 18, 1966.

Respondent, a resident of Washington, was stationed in California under military orders. He bought an automobile while temporarily assigned in Alabama, where he registered it and obtained Alabama license plates. California, on his return, insisted he could not use the Alabama plates in that State but that he had to register the car in California and obtain California plates. When he sought to do so he was advised that he had to pay a registration fee and a 2% "license fee" under the state revenue and tax code. He refused to pay the latter fee. Respondent was thereafter convicted for violating a California misdemeanor provision by driving a vehicle on California highways without registering it and paying "appropriate fees." The California Supreme Court reversed the District Court of Appeal's affirmance of the conviction, on the ground that California had improperly conditioned registration of respondent's car on payment of a fee from which he was exempt under § 514 of the Soldiers' and Sailors' Civil Relief Act of 1940. Section 514 (2)(b) of the Act provides for exemption in the case of motor vehicles, provided that the fee "required by" the home State has been paid. The court reasoned that in respondent's case no such payment to the home State was necessary since the duty to register is imposed only as to cars driven on the home State's highways and he had not driven in the home State that year; that the terms of the proviso were satisfied; and that, since no payment was required, respondent was not subject to the California tax. *Held:*

1. The condition in § 514 (2)(b) for the exemption applicable to nonresident servicemen that they must have paid the licenses, fees, or excises "required by" the State of residence or domicile means that they must have paid such licenses, fees, or excises "of" that State. It was not Congress' intention to permit servicemen in respondent's position completely to avoid registration and licensing requirements, which are within the State's police power to impose. Servicemen may be required to register their cars and obtain license plates in host States if they do not do so in their home States, and may be required to pay all taxes essential thereto. Pp. 391–392.

2. Congress did not intend to include in § 514 (2)(b) taxes imposed only to defray the costs of highway maintenance. Since California authorities had determined that California's 2% "license fee" serves primarily a revenue purpose and is not essential to assure registration of motor vehicles, it does not constitute a "license, fee, or excise" within the meaning of § 514 (2)(b) and nonresident servicemen are therefore exempt from its imposition regardless of whether they are required to register and license their motor vehicles in California because of a failure to do so in their home States. Pp. 392–396.

3. As the California Supreme Court held, the invalidity as to the respondent of the 2% "license fee" constituted a valid defense to the misdemeanor violation for which he was convicted. P. 396.

61 Cal. 2d 833, 395 P. 2d 593, affirmed.

Doris H. Maier, Assistant Attorney General of California, argued the cause for petitioner. With her on the briefs were *Thomas C. Lynch,* Attorney General, and *Edsel W. Haws,* Deputy Attorney General.

Thomas Keister Greer argued the cause for respondent. With him on the brief was *C. Ray Robinson.*

Acting Solicitor General Spritzer, Acting Assistant Attorney General Jones and *I. Henry Kutz* filed a memorandum for the United States, as *amicus curiae,* urging reversal.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Section 514 of the Soldiers' and Sailors' Civil Relief Act of 1940, 56 Stat. 777, as amended, provides a nonresident serviceman present in a State in compliance with military orders with a broad immunity from that State's personal property and income taxation. Section 514 (2)(b) of the Act further provides that

> "the term 'taxation' shall include but not be limited to licenses, fees, or excises imposed in respect to

motor vehicles or the use thereof: *Provided,* That the license, fee, or excise required by the State . . . of which the person is a resident or in which he is domiciled has been paid."[1]

The respondent here, Captain Lyman E. Buzard, was a resident and domiciliary of the State of Washington stationed at Castle Air Force Base in California. He had purchased an Oldsmobile while on temporary duty in Alabama, and had obtained Alabama license plates for it by registering it there. On his return, California refused to allow him to drive the car on California highways with the Alabama plates, and, since he had not registered or obtained license tags in his home State, demanded that he register and obtain license plates in California. When he sought to do so, it was insisted that he pay both the registration fee of $8 imposed by California's Vehicle Code[2] and the considerably larger "license fee" imposed by its Revenue and Taxation code.[3] The license fee is calculated at "two (2) percent of the market value of the vehicle," § 10752, and is "imposed . . . in lieu of all taxes according to value levied for State or local purposes on vehicles . . . subject to registration under the Vehicle Code . . . ." § 10758. Captain Buzard refused to pay the 2% fee,[4] and was prosecuted and convicted for violating Vehicle Code § 4000, which provides that "[N]o person shall drive . . . any motor vehicle . . . upon a highway unless it is registered and the appropriate fees have been paid under this code." The conviction, affirmed by the District Court of Appeal, 38 Cal. Rptr. 63, was reversed by the Supreme Court of California, 61 Cal. 2d 833, 395 P. 2d 593. We granted certiorari, 380 U. S. 931, to consider whether § 514 barred California from exacting the 2% tax as a condition of registering and licensing Captain Buzard's car. We conclude that it did, and affirm.

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[1] 50 U. S. C. App. § 574 (2)(b). Section 514, 50 U. S. C. App. § 574, reads in relevant part as follows:

"(1) For the purposes of taxation in respect of any person, or of his *personal* property, income, or gross income, by any State, . . . such person shall not be deemed to have lost a residence or domicile in any State, . . . solely by reason of being absent therefrom in compliance with military or naval orders, or to have acquired a residence or domicile in, or to have become resident in or a resident of, any other State, . . . while, and solely by reason of being, so absent. For the purposes of taxation in respect of the *personal* property, income, or gross income of any such person by any State, . . . of which such person is not a resident or in which he is not domiciled, . . . *personal property shall not be deemed to be located or present in or to have a situs for taxation in such State, Territory, possession, or political subdivision, or district. . . .*

"(2) *When used in this section, (a) the term 'personal property' shall include tangible and intangible property (including motor vehicles), and (b) the term 'taxation' shall include but not be limited to licenses, fees, or excises imposed in respect to motor vehicles or the use thereof: Provided, That the license, fee, or excise required by the State . . . of which the person is a resident or in which he is domiciled has been paid."* (50 U. S. C. App. § 574.)

The unitalicized text was enacted in 1942, 56 Stat. 777. Concern whether nonresident servicemen were sufficiently protected from personal property taxation by host States led to a clarifying amendment in 1944, 58 Stat. 722. That amendment gave § 514 its two subsections. The italicized words in subsection (1) are the relevant additions to the original section. Subsection (2) was entirely new.

The California Supreme Court's reversal of Captain Buzard's conviction depended on its reading of the words "required by" in the proviso of § 514 (2)(b). In the context of the entire statute and its prior construction, it gave those words the effect of barring the host State from imposing a motor vehicle "license, fee, or excise" unless (1) there was such a tax owing to and assessed by the home State and (2) that tax had not been paid by the serviceman. The mandatory registration statute of Washington, as of most States, imposes the duty to register only as to cars driven on its highways, and Captain Buzard had not driven his car in Washington during the registration year. The court reasoned that there was thus no "license, fee, or excise" owing to and assessed by his home State. Since there was on this view no tax "required by" Washington, the court concluded that California could not impose its tax, even though Captain Buzard had not paid any Washington tax.

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[2] The relevant provisions of the Vehicle Code, enacted in 1935, and recodified in 1959, are §§ 4000, 4750 and 9250.

[3] The relevant provisions of the Revenue and Taxation Code, enacted in 1939, are §§ 10751, 10752 and 10758.

[4] Captain Buzard did not have sufficient cash to pay the $8 registration fee and the approximately $100 demanded in payment of the 2% tax and penalties. He testified without contradiction that at that time he "didn't refuse to pay" the tax. "He [the registration officer] said, 'Do you want to pay it now?' and I said, 'I don't have the money in cash with me, will you accept a check?' and he said, 'No.'" It was thereafter that Captain Buzard asserted his contention that the tax could not legally be assessed.

If this reading of the phrase "required by" in the proviso were correct, no host State could impose any tax on the licensing or registration of a serviceman's motor vehicle unless he had not paid taxes actually owing to and assessed by his home State. If the serviceman were under no obligation to his home State, and payment of taxes was a prerequisite of registration or licensing under the host State statutes, the host State authorities might consider themselves precluded from registering and licensing his car. The California court did not confront this consequence of its construction, because it regarded the relevant provisions of California statutes as allowing registration and licensing whether or not taxes were paid; hence, the possibility of unregistered cars using the California highways was thought not to be at issue.[5] The court's construction, however, per-tained to the federal, not the state, statute; if correct, it would similarly restrict the imposition of other host States' registration and licensing tax provisions, whether or not they are as flexible as California's. We must therefore consider the California court's construction in the light of the possibility that in at least some host States, it would permit servicemen to escape registration requirements altogether.

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[5] "Defendant does not contend that California may not, as an exercise of its police power, require him to register his automobile. In fact, his attempt to register the vehicle independently of the

Thus seen, the California court's construction must be rejected. Although little appears in the legislative history to explain the proviso,[6] Congress was clearly concerned that servicemen stationed away from their home State should not drive unregistered or unlicensed motor vehicles. Every State required in 1944, and requires now, that motor vehicles using its highways be registered and bear license plates. Such requirements are designed to facilitate the identification of vehicle

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payment of fees and penalties was frustrated by the department. Defendant's position is simply that the Soldiers' and Sailors' Civil Relief Act of 1940 . . . prohibits the collection of such fees as an incident to a proper exercise of the police power or otherwise. As a consequence of the narrow question thus raised by the defendant, contentions which look to the purpose of registration in furtherance of proper law enforcement and administration fail to address themselves to the issue." 61 Cal. 2d, at 835, 395 P. 2d, at 594.

The statutory scheme severs the 2% tax provision of the Revenue and Taxation Code from the flat registration fee of $8 requirement in the Vehicle Code. Vehicle Code § 4000, under which respondent was prosecuted, refers only to payments of "the appropriate fees . . . *under this code*" and Vehicle Code § 4750 refers only to "the required fee." (Emphasis supplied.) The severability clause of the Revenue and Taxation Code, § 26, provides that if application of any provision of that Code to "any person or circumstance, is held invalid . . . the application of the provision to other persons or circumstances, is not affected."

[6] H. R. Rep. No. 1514, 78th Cong., 2d Sess.; S. Rep. No. 959, 78th Cong., 2d Sess. There were no debates.

owners and the investigation of accidents, thefts, traffic violations and other violations of law. Commonly, if not universally, the statutes imposing the requirements of registration or licensing also prescribe fees which must be paid to authorize state officials to issue the necessary documents and plates. To assure that servicemen comply with the registration and licensing laws of some State, whether of their home State or the host State, we construe the phrase "license, fee, or excise *required by* the State . . ." as equivalent to "license, fee, or excise *of* the State. . . ." Thus read, the phrase merely indicates Congress' recognition that, in one form or another, all States have laws governing the registration and licensing of motor vehicles, and that such laws impose certain taxes as conditions thereof. The serviceman who has not registered his car and obtained license plates under the laws "of" his home State, whatever the reason, may be required by the host State to register and license the car under its laws.

The proviso is to be read, at the least, as assuring that § 514 would not have the effect of permitting servicemen to escape the obligation of registering and licensing their motor vehicles. It has been argued that § 514 (2)(b) also represents a congressional judgment that servicemen should contribute to the costs of highway maintenance, whether at home or where they are stationed, by paying whatever taxes the State of registration may levy for that purpose. We conclude, however, that no such purpose is revealed in the section or its legislative history and that its intent is limited to the purpose of assuring registration. Since at least the 2% tax here involved has been held not essential to that purpose as a matter of state law, we affirm the California Supreme Court's judgment.

It is plain at the outset that California may collect the 2% tax only if it is a "license, fee, or excise" on a motor vehicle or its use. The very purpose of § 514 in broadly freeing the nonresident serviceman from the obligation to pay property and income taxes was to relieve him of the burden of supporting the governments of the States where he was present solely in compliance with military orders. The statute operates whether or not the home State imposes or assesses such taxes against him. As we said in *Dameron* v. *Brodhead,* 345 U. S. 322, 326, ". . . though the evils of potential multiple taxation may have given rise to this provision, Congress appears to have chosen the broader technique of the statute carefully, freeing servicemen from both income and property taxes imposed by any state by virtue of their presence there as a result of military orders. It saved the sole right of taxation to the state of original residence whether or not that state exercised the right." Motor vehicles were included as personal property covered by the statute. Even if Congress meant to do more by the proviso of § 514 (2)(b) than insure that the car would be registered and licensed in one of the two States, it would be inconsistent with the broad purposes of § 514 to read subsection (2)(b) as allowing the host State to impose taxes other than "licenses, fees, or excises" when the "license, fee, or excise" of the home State is not paid.[7]

Although the Revenue and Taxation Code expressly denominates the tax "a license fee," § 10751, there is no persuasive evidence Congress meant state labels to be conclusive; therefore, we must decide as a matter of federal law what "licenses, fees, or excises" means in the statute. See *Storaasli* v. *Minnesota,* 283 U. S. 57, 62. There is nothing in the legislative history to show that Congress intended a tax not essential to assure registration, such as the California "license fee," to fall within the category of "licenses, fees, or excises" host States might impose if home State registration was not effected. While it is true that a few state taxes in effect in 1944, like the California 2% "license fee," were imposed solely for revenue purposes, the great majority of state taxes also served to enforce registration and licensing statutes.[8] No discussion of existing state laws appears in the Committee Reports. There is thus no indication that Congress was aware that any State required that servicemen contribute to the costs of highway maintenance without regard to the relevance of such requirements to the nonrevenue purposes of state motor vehicle laws.

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[7] Contra, *Whiting* v. *City of Portsmouth,* 202 Va. 609, 118 S. E. 2d 505; *Snapp* v. *Neal,* 250 Miss. 597, 164 So. 2d 752, reversed today, *post,* p. 397.

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[8] Most States in 1944, as now, conditioned registration and the issuance of license plates upon the payment of a registration fee measured by horsepower, weight or some combination of these factors. See, *e. g.*, Del. Rev. Code 1935, § 5564 (weight); Page's Ohio Gen. Code (1945 Repl. Vol.), § 6292 (weight); Mo. Rev. Stat. Ann. 1942, § 8369 (horsepower); N. J. Rev. Stat. 1937, § 39:3-8 (horsepower); Conn. Gen. Stat. Rev. 1930, § 1578 (cubic displacement); Iowa Code 1939, § 5008.05 (value and weight); Digest Ark. Stat. 1937, § 6615 (horsepower and weight).

Other States charged a flat fee. See, *e. g.*, Ore. Comp. Laws 1940, §§ 115-105, 115-106; Ariz. Code 1939, § 66-256; Alaska Comp. Laws 1933, § 3151.

A few States, such as California, charged both a flat registration fee and a larger, variable "license fee" measured by vehicle value. See, *e. g.*, Cal. Vehicle Code 1935, §§ 140, 148, 370, Cal. Rev. & Tax. Code 1939, §§ 10751-10758; Remington's Wash. Rev. Stat. (1937 Repl. Vol.), §§ 6312-16, 6312-102; compare Miss. Code 1942, §§ 9352-19, 9352-03 (certificate of payment of ad valorem tax required of those who must pay it); Wyo. Comp. Stat. 1945, §§ 60-103, 60-104 (flat fee plus ad valorem fee; ad valorem fee to be paid only by persons actually driving in the State).

The statutes commonly recited that these fees, whatever their measure, were imposed for the privilege of using the State's highways; the proceeds were usually devoted to highway purposes. Even where property value was the measure of the fees, they were characterized as privilege, not property, taxes. See, *e. g.*, *Ingels* v. *Riley*, 5 Cal. 2d 154, 53 P. 2d 939 (1936).

The conclusion that Congress lacked information about the California practice does not preclude a determination that it meant to include such taxes, levied only for revenue, as "licenses, fees, or excises." But in deciding that question in the absence of affirmative indication of congressional meaning, we must consider the overall purpose of § 514 as well as the words of subsection (2)(b). Taxes like the California 2% "license fee" serve primarily a revenue interest, narrower in purpose but no different in kind from taxes raised to defray the general expenses of government.[9] It is from the burden of taxes serving such ends that nonresident servicemen were to be freed, in the main, without regard to whether their home States imposed or sought to collect such taxes from them. *Dameron* v. *Brodhead, supra.* In recent amendments, Congress has reconfirmed this basic purpose.[10] We do not think that subsection (2)(b) should be read as impinging upon it. Rather, reading the Act, as we must, "with an eye friendly to those who dropped their affairs to answer their country's call," *Le Maistre* v. *Leffers,* 333 U. S. 1, 6, we conclude that subsection (2)(b) refers only to those taxes which are essential to the functioning of the host State's licensing and registration laws in their application to the motor vehicles of nonresident servicemen. Whether the 2% tax is within the reach of the federal immunity is thus not to be tested, as California argues, by whether its inclusion frustrates the administration of California's tax policies. The test, rather, is whether the inclusion would deny the State power to enforce the nonrevenue provisions of state motor vehicle legislation.

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[9] Indeed, the 2% "license fee" was adopted in 1935 as a substitute for local ad valorem taxation of automobiles, which had proved administratively impractical. Stockwell, Studies in California State Taxation, 1910–1935, at pp. 108–110 (1939); Final Report of the California Tax Commission 102 (1929). Its basis remains the location of the automobile in the State.

[10] Pub. L. § 87–771, 76 Stat. 768.

Whatever may be the case under the registration and licensing statutes of other States, California authorities have made it clear that the California 2% tax is not imposed as a tax essential to the registration and licensing of the serviceman's motor vehicle.[11] Not only did the California Supreme Court regard the statutes as permitting registration without payment of the tax, but the District Court of Appeal, in another case growing out of this controversy, expressly held that "[t]he registration statute has an entirely different purpose from the license fee statutes, and it is clearly severable from them." *Buzard* v. *Justice Court,* 198 Cal. App. 2d 814, 817, 18 Cal. Rptr. 348, 349–350.[12] The California Supreme Court also held, in effect, that invalidity of the "license fee" as applied was a valid defense to prosecution under Vehicle Code § 4000. In these circumstances, and since the record is reasonably to be read as showing that Captain Buzard would have registered his Oldsmobile but for the demand for payment of the 2% tax, the California Supreme Court's reversal of his conviction is

Affirmed.

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[11] It is not clear from the California courts' opinions whether they regard the $8 registration fee as a fee essential to the registration and licensing of the motor vehicle. Therefore that question remains open for determination in the state courts.

[12] See note 5, *supra.*

SNAPP *v.* NEAL, STATE AUDITOR, ET AL.

CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI.

No. 16. Argued November 15–16, 1965. Decided January 18, 1966.

Imposition by a host State of an ad valorem tax on a nonresident serviceman's house trailer, where the serviceman had paid no "license, fee, or excise" to his home State, *held* invalid under § 514 of the Soldiers' and Sailors' Civil Relief Act of 1940, an ad valorem tax not being within the category of a motor vehicle "license, fee, or excise" under § 514 (2)(b). *California* v. *Buzard, ante,* p. 386, followed. P. 398.

250 Miss. 597, 164 So. 2d 752, reversed.

Leon D. Hubert, Jr., argued the cause for petitioner. With him on the briefs was *Carl J. Felth.*

Martin R. McLendon, Assistant Attorney General of Mississippi, argued the cause for respondents. With him on the brief was *Joe T. Patterson,* Attorney General.

Acting Solicitor General Spritzer, Acting Assistant Attorney General Jones and *I. Henry Kutz* filed a brief for the United States, as *amicus curiae,* urging reversal.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This is a companion case to *California* v. *Buzard, ante,* p. 386, decided today. The State of Mississippi levied an ad valorem tax against a house trailer of the petitioner, Sergeant Jesse E. Snapp. Sergeant Snapp was stationed under military orders at Crystal Springs Air Force Base, Mississippi. He bought the trailer in Mississippi and moved it on Mississippi highways to a private trailer park near the Air Force Base where he placed it on movable concrete blocks and used it as a home. He did not register or license the trailer, or pay any taxes on it in his home State of South Carolina. He challenged the Mississippi tax as a tax on his personal property prohibited by the Soldiers' and Sailors' Civil Relief Act of 1940, 54 Stat. 1178, as amended in 1944, § 514, 50 U. S. C. App. § 574.* The Mississippi Supreme Court sustained the levy on the ground that, as applied to motor vehicles, § 514 (2)(b) conditions the nonresident serviceman's immunity from its ad valorem tax on the serviceman's prior payment of the fees imposed by his home State. The court reasoned that since § 514 (2)(b) "stipulat[es] expressly that the taxation should not be limited to privilege and excise taxes, it necessarily follows that the prohibited tax must include the only other general branch of taxation, that is, ad valorem. It is emphasized that the federal statute is meant to include ad valorem taxes as being one of the taxes for which the serviceman is *immune, provided he complies with the laws of his home state concerning registration of the motor vehicle.* If he fails to so comply, as was done in this case at bar, he is no longer entitled to protection of the Act of Congress." 250 Miss. 597, at 614–615, 164 So. 2d 752, at 760. We granted certiorari, 380 U. S. 931. We reverse on the authority of our holding today in *Buzard* that the failure to pay the motor vehicle "license, fee, or excise" of the home State entitles the host State only to exact motor vehicle taxes qualifying as "licenses, fees, or excises"; the ad valorem tax, as the Mississippi Supreme Court acknowledged, is not such an exaction. We thus have no occasion to decide whether the Mississippi Supreme Court was correct in holding that the house trailer was a "motor vehicle" within the meaning of § 514 (2)(b).

Reversed.

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*The relevant text of the statute is in *California* v. *Buzard*, *ante*, p. 388, n. 1.

GIACCIO *v.* PENNSYLVANIA.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

No. 47. Argued December 6, 1965.—Decided January 19, 1966.

Appellant was acquitted following a jury trial on a misdemeanor indictment. Costs were assessed against him under an 1860 Pennsylvania statute permitting jurors to "determine, by their verdict, whether the [acquitted] defendant shall pay the costs," and providing for his commitment to jail in default of payment or security. The jury had been instructed that it could place the prosecution costs on appellant though found guiltless of the charges if nevertheless it found him guilty of "some misconduct" less than that charged but which had brought on the prosecution and warranted some penalty short of conviction. The trial court upheld appellant's contention that the statute violated due process requirements of the Fourteenth Amendment. The intermediate appellate court reversed the trial court and was sustained by the State Supreme Court. *Held:* The 1860 Act violates the Due Process Clause because of vagueness and the absence of any standards that would prevent arbitrary imposition of costs. Pp. 402–405.

(a) Regardless of whether the Act is "penal" or "civil," it must meet the due process requirements of the Fourteenth Amendment. P. 402.

(b) The absence of any statutory standards is not cured by judicial interpretations that allow juries to impose costs on a defendant where they find the defendant's conduct though not unlawful was "reprehensible" or "improper" or where the jury finds that the defendant committed "some misconduct." Pp. 402–405.

415 Pa. 139, 202 A. 2d 55, reversed and remanded.

Peter Hearn argued the cause for appellant. With him on the brief were *James C. N. Paul* and *Paul J. Mishkin.*

John S. Halsted argued the cause for appellee. With him on the brief were *Walter E. Alessandroni,* Attorney General of Pennsylvania, *Graeme Murdock,* Deputy Attorney General, and *A. Alfred Delduco.*

MR. JUSTICE BLACK delivered the opinion of the Court.

Appellant Giaccio was indicted by a Pennsylvania grand jury and charged with two violations of a state statute which makes it a misdemeanor to wantonly point or discharge a firearm at any other person.[1] In a trial before a judge and jury appellant's defense was that the firearm he had discharged was a starter pistol which only fired blanks. The jury returned a verdict of not guilty on each charge, but acting pursuant to instructions of the court given under authority of a Pennsylvania statute of 1860, assessed against appellant the court costs of one of the charges (amounting to $230.95). The Act of 1860, set out below,[2] provides among other things that:

> ". . . in all cases of acquittals by the petit jury on indictments for [offenses other than felonies], the jury trying the same shall determine, by their verdict, whether the county, or the prosecutor, or the

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[1] Act of June 24, 1939, Pub. L. 872, § 716, Pa. Stat. Ann., Tit. 18, § 4716.

[2] Act of March 31, 1860, Pub. L. 427, § 62, Pa. Stat. Ann., Tit. 19, § 1222, provides:

"In all prosecutions, cases of felony excepted, if the bill of indictment shall be returned ignoramus, the grand jury returning the same shall decide and certify on such bill whether the county or the prosecutor shall pay the costs of prosecution; and in all cases of acquittals by the petit jury on indictments for the offenses aforesaid, the jury trying the same shall determine, by their verdict, whether the county, or the prosecutor, or the defendant shall pay the costs, or whether the same shall be apportioned between the prosecutor and the defendant, and in what proportions; and the jury, grand or petit, so determining, in case they direct the prosecutor to pay the costs or any portion thereof, shall name him in their return or verdict; and whenever the jury shall determine as aforesaid, that the prosecutor or defendant shall pay the costs, the court in which the said determination shall be made shall forthwith pass sentence to that effect, and order him to be committed to the jail of the county until the costs are paid, unless he give security to pay the same within ten days."

> defendant shall pay the costs . . . and whenever the jury shall determine as aforesaid, that the . . . defendant shall pay the costs, the court in which the said determination shall be made shall forthwith pass sentence to that effect, and order him to be committed to the jail of the county until the costs are paid, unless he give security to pay the same within ten days."

Appellant made timely objections to the validity of this statute on several grounds,[3] including an objection that the statute is unconstitutionally vague in violation of the Fourteenth Amendment's Due Process Clause because it authorizes juries to assess costs against acquitted defendants, with a threat of imprisonment until the costs are paid, without prescribing definite standards to govern the jury's determination. The trial court held the 1860 Act void for vagueness in violation of due process, set aside the jury's verdict imposing costs on the appellant, and vacated the "sentence imposed upon Defendant that he pay said costs forthwith or give security to pay the same within ten (10) days and to stand committed until he had complied therewith."[4] The Superior Court of Pennsylvania, one judge dissenting, reversed the trial court closing its opinion this way:

> "We can find no reason that would justify our holding it [the 1860 Act] unconstitutional.
>
> "Order reversed, sentence reinstated."[5]

The State Supreme Court, again with one judge dissenting, agreed with the Superior Court and affirmed its judgment.[6] This left appellant subject to the judgment for costs and the "sentence" to enforce payment. We noted jurisdiction to consider the question raised concerning vagueness and absence of proper standards in the 1860 Act. 381 U. S. 923. We agree with the trial court and the dissenting judges in the appellate courts below that the 1860 Act is invalid under the Due Process Clause because of vagueness and the absence of any standards sufficient to enable defendants to protect themselves against arbitrary and discriminatory impositions of costs.

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[3] One objection was that the Act violates the Equal Protection Clause of the Fourteenth Amendment because it discriminates against defendants in misdemeanor cases by imposing greater burdens upon them than upon defendants in felony cases and cases involving summary offenses. We do not reach or decide this question.

[4] 30 Pa. D. & C. 2d 463 (Q. S. Chester, 1963).

[5] 202 Pa. Super. 294, 310, 196 A. 2d 189, 197.

1. In holding that the 1860 Act was not unconstitutionally vague the State Superior and Supreme Courts rested largely on the declaration that the Act "is not a penal statute" but simply provides machinery for the collection of costs of a "civil character" analogous to imposing costs in civil cases "not as a penalty but rather as compensation to a litigant for expenses. . . ." But admission of an analogy between the collection of civil costs and collection of costs here does not go far towards settling the constitutional question before us. Whatever label be given the 1860 Act, there is no doubt that it provides the State with a procedure for depriving an acquitted defendant of his liberty and his property. Both liberty and property are specifically protected by the Fourteenth Amendment against any state deprivation which does not meet the standards of due process, and this protection is not to be avoided by the simple label a State chooses to fasten upon its conduct or its statute. So here this state Act whether labeled "penal" or not must meet the challenge that it is unconstitutionally vague.

2. It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to

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[6] 415 Pa. 139, 202 A. 2d 55.

decide, without any legally fixed standards, what is prohibited and what is not in each particular case. See, *e. g., Lanzetta* v. *New Jersey,* 306 U. S. 451; *Baggett* v. *Bullitt,* 377 U. S. 360. This 1860 Pennsylvania Act contains no standards at all, nor does it place any conditions of any kind upon the jury's power to impose costs upon a defendant who has been found by the jury to be not guilty of a crime charged against him. The Act, without imposing a single condition, limitation or contingency on a jury which has acquitted a defendant simply says the jurors "shall determine, by their verdict, whether . . . the defendant, shall pay the costs" whereupon the trial judge is told he "shall forthwith pass sentence to that effect, and order him [defendant] to be committed to the jail of the county" there to remain until he either pays or gives security for the costs. Certainly one of the basic purposes of the Due Process Clause has always been to protect a person against having the Government impose burdens upon him except in accordance with the valid laws of the land. Implicit in this constitutional safeguard is the premise that the law must be one that carries an understandable meaning with legal standards that courts must enforce. This state Act as written does not even begin to meet this constitutional requirement.

3. The State contends that even if the Act would have been void for vagueness as it was originally written, subsequent state court interpretations have provided standards and guides that cure the former constitutional deficiencies. We do not agree. All of the so-called court-created conditions and standards still leave to the jury such broad and unlimited power in imposing costs on acquitted defendants that the jurors must make determinations of the crucial issue upon their own notions of what the law should be instead of what it is. Pennsylvania decisions have from time to time said expressly, or at least implied, that juries having found a defendant not

guilty may impose costs upon him if they find that his conduct, though not unlawful, is "reprehensible in some respect," "improper," outrageous to "morality and justice," or that his conduct was "not reprehensible enough for a criminal conviction but sufficiently reprehensible to deserve an equal distribution of costs" or that though acquitted "his innocence may have been doubtful."[7] In this case the trial judge instructed the jury that it might place the costs of prosecution on the appellant, though found not guilty of the crime charged, if the jury found that "he has been guilty of some misconduct less than the offense which is charged but nevertheless misconduct of some kind as a result of which he should be required to pay some penalty short of conviction [and] . . . his misconduct has given rise to the prosecution."

It may possibly be that the trial court's charge comes nearer to giving a guide to the jury than those that preceded it, but it still falls short of the kind of legal standard due process requires. At best it only told the jury that if it found appellant guilty of "some misconduct" less than that charged against him, it was authorized by law to saddle him with the State's costs in its unsuccessful prosecution. It would be difficult if not impossible for a person to prepare a defense against such general abstract charges as "misconduct," or "reprehensible conduct." If used in a *statute* which imposed forfeitures, punishments or judgments for costs, such loose and unlimiting terms would certainly cause the statute to fail to measure up to the requirements of the Due Process Clause. And these terms are no more effective to make a statute valid which standing alone is void for vagueness.

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[7] The foregoing quotations appear in a number of Pennsylvania cases including *Commonwealth* v. *Tilghman*, 4 S. & R. 127; *Baldwin* v. *Commonwealth*, 26 Pa. 171; *Commonwealth* v. *Daly*, 11 Pa. Dist. 527 (Q. S. Clearfield); and in the opinion of the Superior Court in this case, 202 Pa. Super. 294, 196 A. 2d 189.

We hold that the 1860 Act is constitutionally invalid both as written and as explained by the Pennsylvania courts.[8] The judgment against appellant is reversed and the case is remanded to the State Supreme Court for further proceedings not inconsistent with this opinion.

Reversed and remanded.

MR. JUSTICE STEWART, concurring.

I concur in the Court's determination that the Pennsylvania statute here in question cannot be squared with the standards of the Fourteenth Amendment, but for reasons somewhat different from those upon which the Court relies. It seems to me that, despite the Court's disclaimer,* much of the reasoning in its opinion serves to cast grave constitutional doubt upon the settled practice of many States to leave to the unguided discretion of a jury the nature and degree of punishment to be imposed upon a person convicted of a criminal offense. Though I have serious questions about the wisdom of that practice, its constitutionality is quite a different matter. In the present case it is enough for me that Pennsylvania allows a jury to punish a defendant after finding him not guilty. That, I think, violates the most rudimentary concept of due process of law.

MR. JUSTICE FORTAS, concurring.

In my opinion, the Due Process Clause of the Fourteenth Amendment does not permit a State to impose a penalty or costs upon a defendant whom the jury has found not guilty of any offense with which he has been charged.

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[8] In so holding we intend to cast no doubt whatever on the constitutionality of the settled practice of many States to leave to juries finding defendants guilty of a crime the power to fix punishment within legally prescribed limits.

*See n. 8, *ante*.

TEHAN, SHERIFF *v.* UNITED STATES EX REL. SHOTT.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 52. Argued November 18, 1965.—Decided January 19, 1966.

In 1961 respondent was tried and convicted in an Ohio court for violation of the Ohio Securities Act. Respondent had not taken the stand and the prosecutor commented extensively, as permitted by Ohio law, on his failure to testify. The conviction was affirmed by an Ohio court of appeals, the State Supreme Court declined review, and this Court dismissed an appeal and denied certiorari in 1963. Shortly thereafter respondent sought a writ of habeas corpus, alleging various constitutional violations at his trial. The federal District Court dismissed the petition, but the Court of Appeals reversed, noting that on the day preceding oral argument of the appeal the Supreme Court in *Malloy* v. *Hogan*, 378 U. S. 1, held that the Fifth Amendment's freedom from self-incrimination is also protected by the Fourteenth against state abridgment, and reasoning that the protection includes freedom from comment on failure to testify. In *Griffin* v. *California*, 380 U. S. 609, this Court held that adverse comment on a defendant's failure to testify in a state criminal trial violates the privilege against self-incrimination, and the parties here were requested to brief and argue the question of the retroactivity of that doctrine. *Held:* The doctrine of *Griffin* v. *California* will not be applied retrospectively. *Linkletter* v. *Walker*, 381 U. S. 618, followed. Pp. 409–419.

337 F. 2d 990, vacated and remanded.

Calvin W. Prem argued the cause for petitioner. With him on the brief was *Melvin G. Rueger*.

Thurman Arnold argued the cause for respondent. With him on the brief were *James G. Andrews, Jr.,* and *John A. Lloyd, Jr.*

Thomas C. Lynch, Attorney General of California, *Arlo E. Smith,* Chief Assistant Attorney General, *Albert*

W. Harris, Jr., Assistant Attorney General, and *Derald E. Granberg*, Deputy Attorney General, filed a brief for the State of California, as *amicus curiae*, urging reversal.

MR. JUSTICE STEWART delivered the opinion of the Court.

In 1964 the Court held that the Fifth Amendment's privilege against compulsory self-incrimination "is also protected by the Fourteenth Amendment against abridgment by the States." *Malloy* v. *Hogan*, 378 U. S. 1, 6. In *Griffin* v. *California*, decided on April 28, 1965, the Court held that adverse comment by a prosecutor or trial judge upon a defendant's failure to testify in a state criminal trial violates the federal privilege against compulsory self-incrimination, because such comment "cuts down on the privilege by making its assertion costly." 380 U. S. 609, 614. The question before us now is whether the rule of *Griffin* v. *California* is to be given retrospective application.

I.

In the summer of 1961 the respondent was brought to trial before a jury in an Ohio court upon an indictment charging violations of the Ohio Securities Act.[1] The respondent did not testify in his own behalf, and the prosecuting attorney in his summation to the jury commented extensively upon that fact.[2] The jury found the respondent guilty, the judgment of conviction was affirmed by an Ohio court of appeals, and the Supreme Court of Ohio declined further review. 173 Ohio St. 542, 184 N. E. 2d 213. The respondent then brought his case to this Court, claiming several constitutional errors but not attacking the Ohio comment rule as such. On May 13, 1963, we dismissed the appeal and denied certiorari, MR. JUSTICE BLACK dissenting. 373 U. S. 240. All avenues of direct review of the respondent's conviction were thus fully foreclosed more than a year before our decision in *Malloy* v. *Hogan, supra,* and almost two years before our decision in *Griffin* v. *California, supra.*

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[1] Ohio Rev. Code §§ 1707.01–1707.45.

[2] Since 1912 a provision of the Ohio Constitution has permitted a prosecutor to comment upon a defendant's failure to testify in a criminal trial. Article I, § 10, of the Constitution of Ohio provides, in part, as follows: "No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be the subject of comment by counsel."

Section 2945.43 of the Revised Code of Ohio contains substantially the same wording.

A few weeks after our denial of certiorari the respondent sought a writ of habeas corpus in the United States District Court for the Southern District of Ohio, again alleging various constitutional violations in his state trial. The District Court dismissed the petition, and the respondent appealed to the United States Court of Appeals for the Sixth Circuit. On November 10, 1964, that court reversed, noting that "the day before the oral argument of this appeal, the Supreme Court in Malloy v. Hogan . . . reconsidered its previous rulings and held that the Fifth Amendment's exception from self-incrimination is also protected by the Fourteenth Amendment against abridgment by the states," and reasoning that "the protection against self-incrimination under the Fifth Amendment includes not only the right to refuse to answer incriminating questions, but also the right that such refusal shall not be commented upon by counsel for the prosecution." 337 F. 2d 990, 992.

We granted certiorari, requesting the parties "to brief and argue the question of the retroactivity of the doctrine announced in *Griffin* v. *California* . . . ." 381 U. S. 923. Since, as we have noted, the original Ohio judgment of conviction in this case became final long before *Griffin* v. *California* was decided by this Court, that question is squarely presented.[3]

II.

In *Linkletter* v. *Walker,* 381 U. S. 618, we held that the exclusionary rule of *Mapp* v. *Ohio,* 367 U. S. 643, was not to be given retroactive effect. The *Linkletter* opinion reviewed in some detail the competing conceptual and jurisprudential theories bearing on the problem of whether a judicial decision that overturns previously established law is to be given retroactive or only prospective application. MR. JUSTICE CLARK's opinion for the Court outlined the history and theory of the problem in terms both of the views of the commentators and of the decisions in this and other courts which have reflected those views. It would be a needless exercise here to survey again a field so recently and thoroughly explored.[4]

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[3] The Supreme Court of California and the Supreme Court of Ohio have both considered the question, and each court has unanimously held that under the controlling principles discussed in *Linkletter* v. *Walker,* 381 U. S. 618, the *Griffin* rule is not to be applied retroactively in those States. *In re Gaines,* 63 Cal. 2d 234, 404 P. 2d 473; *Pinch* v. *Maxwell,* 3 Ohio St. 2d 212, 210 N. E. 2d 883.

As in *Linkletter,* the question in the present case is not one of "pure prospectivity." The rule announced in *Griffin* was applied to reverse Griffin's conviction. Compare *England* v. *Louisiana State Board of Medical Examiners,* 375 U. S. 411. Nor is there any question of the applicability of the *Griffin* rule to cases still pending on direct review at the time it was announced. Cf. *O'Connor* v. *Ohio, ante,* p. 286.

The precise question is whether the rule of *Griffin* v. *California* is to be applied to cases in which the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari elapsed or a petition for certiorari finally denied, all before April 28, 1965.

[4] See *Linkletter* v. *Walker,* 381 U. S. 618, 622–628.

Rather, we take as our starting point *Linkletter*'s conclusion that "the accepted rule today is that in appropriate cases the Court may in the interest of justice make the rule prospective," that there is "no impediment—constitutional or philosophical—to the use of the same rule in the constitutional area where the exigencies of the situation require such an application," in short that "the Constitution neither prohibits nor requires retrospective effect." Upon that premise, resolution of the issue requires us to "weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." 381 U. S., at 628–629.[5]

III.

Twining v. *New Jersey* was decided in 1908. 211 U. S. 78. In that case the plaintiffs in error had been convicted by the New Jersey courts after a trial in which the judge had instructed the jury that it might draw an adverse inference from the defendants' failure to testify. The plaintiffs in error urged in this Court two propositions: "first, that the exemption from compulsory self-incrimination is guaranteed by the Federal Constitution against impairment by the States; and, second, if it be so guaranteed, that the exemption was in fact impaired in the case at bar." 211 U. S., at 91. In a lengthy opinion which thoroughly considered both the Privileges and Immunities Clause and the Due Process Clause of the Fourteenth Amendment, the Court held, explicitly and unambiguously, "that the exemption from compulsory self-incrimination in the courts of the States is not secured by any part of the Federal Constitution." 211 U. S., at 114. Having thus rejected the first proposition advanced by the plaintiffs in error, the Court refrained from passing on the second. That is, the Court did not decide whether adverse comment upon a defendant's failure to testify constitutes a violation of the federal constitutional right against self-incrimination.[6]

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[5] For a recent commentary on the *Linkletter* decision and a suggested alternative approach to the problem, see Mishkin, The Supreme Court 1964 Term—Foreword: The High Court, The Great Writ, and the Due Process of Time and Law, 79 Harv. L. Rev. 56.

The rule thus established in the *Twining* case was reaffirmed many times through the ensuing years. In an opinion for the Court in 1934, Mr. Justice Cardozo cited *Twining* for the proposition that "[t]he privilege against self-incrimination may be withdrawn and the accused put upon the stand as a witness for the state." *Snyder* v. *Massachusetts,* 291 U. S. 97, 105. Two years later Chief Justice Hughes, writing for a unanimous Court, reiterated the explicit statements of the rule in *Twining* and *Snyder,* noting that "[t]he compulsion to which the quoted statements refer is that of the processes of justice by which the accused may be called as a witness and required to testify." *Brown* v. *Mississippi,* 297 U. S. 278, 285. In 1937 the Court again approved the *Twining* doctrine in *Palko* v. *Connecticut,* 302 U. S. 319, 324, 325–326. In *Adamson* v. *California,* 332 U. S. 46, the issue was once more presented to the Court in much the same form as it had been presented almost 40 years earlier in *Twining.* In *Adamson* there had been comment by judge and prosecutor upon the defendant's failure to testify at his trial, as permitted by the California Constitution. The Court again followed *Twining* in holding that the Fourteenth Amendment does not require a State to accord the privilege against self-incrimination, and, as in *Twining*, the Court did not reach the question whether adverse comment upon a defendant's failure to testify would violate the Fifth Amendment privilege.[7] Thereafter the Court continued to adhere to the *Twining* rule, notably in *Knapp* v. *Schweitzer*, decided in 1958, 357 U. S. 371, 374, and in *Cohen* v. *Hurley*, decided in 1961, 366 U. S. 117, 127–129.

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[6] "We have assumed only for the purpose of discussion that what was done in the case at bar was an infringement of the privilege against self-incrimination. We do not intend, however, to lend any countenance to the truth of that assumption. The courts of New Jersey, in adopting the rule of law which is complained of here, have deemed it consistent with the privilege itself and not a denial of it. . . . The authorities upon the question are in conflict. We do not pass upon the conflict, because, for the reasons given, we think that the exemption from compulsory self-incrimination in the courts of the States is not secured by any part of the Federal Constitution." 211 U. S., at 114.

In recapitulation, this brief review clearly demonstrates: (1) For more than half a century, beginning in 1908, the Court adhered to the position that the Federal Constitution does not require the States to accord the Fifth Amendment privilege against self-incrimination. (2) Because of this position, the Court during that period never reached the question whether the federal guarantee against self-incrimination prohibits adverse comment upon a defendant's failure to testify at his trial.[8] Although there were strong dissenting voices,[9] the Court made not the slightest deviation from that position during a period of more than 50 years.

Thus matters stood in 1964, when *Malloy* v. *Hogan* announced that the Fifth Amendment privilege against self-incrimination is protected by the Fourteenth Amendment against abridgment by the States (378 U. S., at 6). Less than a year later, on April 28, 1965, *Griffin* v. *California* held that the Fifth Amendment "in its bearing on the States by reason of the Fourteenth Amendment, forbids . . . comment by the prosecution on the accused's silence . . . ." (380 U. S., at 615.)

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[7] As the Court pointed out in *Adamson*, 332 U. S., at 50, n. 6, this question had never arisen in the federal courts, because a federal *statute* had been interpreted as prohibiting adverse comment upon a defendant's failure to testify in a federal criminal trial. See 20 Stat. 30, as amended, now 18 U. S. C. § 3481; *Bruno* v. *United States*, 308 U. S. 287; *Wilson* v. *United States*, 149 U. S. 60.

[8] In the federal judicial system, the matter was controlled by a statute. See n. 7, *supra*.

[9] See, *e. g.*, MR. JUSTICE BLACK's historic dissenting opinion in *Adamson* v. *California*, 332 U. S., at 68.

IV.

Thus we must reckon here, as in *Linkletter,* 381 U. S., at 636, with decisional history of a kind which Chief Justice Hughes pointed out "is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration." *Chicot County Drainage Dist.* v. *Baxter State Bank,* 308 U. S. 371, 374. It is against this background that we look to the purposes of the *Griffin* rule, the reliance placed upon the *Twining* doctrine, and the effect on the administration of justice of a retrospective application of *Griffin.* See *Linkletter* v. *Walker,* 381 U. S., at 636.

In *Linkletter,* the Court stressed that the prime purpose of the rule of *Mapp* v. *Ohio,*[10] rejecting the doctrine of *Wolf* v. *Colorado*[11] as to the admissibility of unconstitutionally seized evidence, was "to deter the lawless action of the police and to effectively enforce the Fourth Amendment." 381 U. S., at 637. There we could not "say that this purpose would be advanced by making the rule retrospective. The misconduct of the police prior to *Mapp* has already occurred and will not be corrected by releasing the prisoners involved." *Ibid.*

No such single and distinct "purpose" can be attributed to *Griffin* v. *California,* holding it constitutionally impermissible for a State to permit comment by a judge or prosecutor upon a defendant's failure to testify in a criminal trial. The *Griffin* opinion reasoned that such comment "is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." 380 U. S., at 614. It follows that the "purpose" of the *Griffin* rule is to be found in the whole complex of values that the privilege against self-incrimination itself represents, values described in the *Malloy* case as reflecting "recognition that the American system of criminal prosecution is accusatorial, not inquisitorial, and that the Fifth Amendment privilege is its essential mainstay. . . . Governments, state and federal, are thus constitutionally compelled to establish guilt by evidence independently and freely secured, and may not by coercion prove a charge against an accused out of his own mouth."[12] 378 U. S., at 7–8.

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[10] 367 U. S. 643.

[11] 338 U. S. 25.

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[12] These values were further catalogued in Mr. Justice Goldberg's opinion for the Court in *Murphy* v. *Waterfront Comm'n,* 378 U. S. 52, announced the same day as *Malloy* v. *Hogan,* 378 U. S. 1: "The privilege against self-incrimination 'registers an important advance in the development of our liberty—"one of the great landmarks in man's struggle to make himself civilized."' *Ullmann* v. *United States,* 350 U. S. 422, 426. [The quotation is from Griswold, The Fifth Amendment Today (1955), 7.] It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load,' 8 Wigmore, Evidence (McNaughton rev., 1961), 317; our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life,' *United States* v. *Grunewald,* 233 F. 2d 556, 581–582 (Frank, J., dissenting), rev'd 353 U. S. 391; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes 'a shelter to the guilty,' is often 'a protection to

Insofar as these "purposes" of the Fifth Amendment privilege against compulsory self-incrimination bear on the question before us in the present case, several considerations become immediately apparent. First, the basic purposes that lie behind the privilege against self-incrimination do not relate to protecting the innocent from conviction, but rather to preserving the integrity of a judicial system in which even the guilty are not to be convicted unless the prosecution "shoulder the entire load." Second, since long before *Twining* v. *New Jersey,* all the States have by their own law respected these basic purposes by extending the protection of the testimonial privilege against self-incrimination to every defendant tried in their criminal courts. In *Twining* the Court noted that "all the States of the Union have, from time to time, with varying form but uniform meaning, included the privilege in their constitutions, except the States of New Jersey and Iowa, and in those States it is held to be part of the existing law." 211 U. S., at 92. See also 8 Wigmore, Evidence § 2252 (McNaughton rev. 1961). It follows that such variations as may have existed among the States in the application of their respective guarantees against self-incrimination during the 57 years between *Twining* and *Griffin* did not go to the basic purposes of the federal privilege. And finally,

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the innocent.' *Quinn* v. *United States,* 349 U. S. 155, 162." 378 U. S., at 55. "[T]he privilege against self-incrimination represents many fundamental values and aspirations. It is 'an expression of the moral striving of the community . . . a reflection of our common conscience . . . .' *Malloy* v. *Hogan, ante,* p. 9, n. 7, quoting Griswold, The Fifth Amendment Today (1955), 73. That is why it is regarded as so fundamental a part of our constitutional fabric, despite the fact that 'the law and the lawyers . . . have never made up their minds just what it is supposed to do or just whom it is intended to protect.' Kalven, Invoking the Fifth Amendment—Some Legal and Impractical Considerations, 9 Bull. Atomic Sci. 181, 182." 378 U. S., at 56, n. 5.

insofar as strict application of the federal privilege against self-incrimination reflects the Constitution's concern for the essential values represented by "our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life,' "[13] any impingement upon those values resulting from a State's application of a variant from the federal standard cannot now be remedied. As we pointed out in *Linkletter* with respect to the Fourth Amendment rights there in question, "the ruptured privacy . . . cannot be restored." 381 U. S., at 637.

As in *Mapp*, therefore, we deal here with a doctrine which rests on considerations of quite a different order from those underlying other recent constitutional decisions which have been applied retroactively. The basic purpose of a trial is the determination of truth, and it is self-evident that to deny a lawyer's help through the technical intricacies of a criminal trial or to deny a full opportunity to appeal a conviction because the accused is poor is to impede that purpose and to infect a criminal proceeding with the clear danger of convicting the innocent. See *Gideon* v. *Wainwright,* 372 U. S. 335; *Doughty* v. *Maxwell,* 376 U. S. 202; *Griffin* v. *Illinois,* 351 U. S. 12; *Eskridge* v. *Washington Prison Board,* 357 U. S. 214. The same can surely be said of the wrongful use of a coerced confession. See *Jackson* v. *Denno,* 378 U. S. 368; *McNerlin* v. *Denno,* 378 U. S. 575; *Reck* v. *Pate,* 367 U. S. 433. By contrast, the Fifth Amendment's privilege against self-incrimination is not an adjunct to the ascertainment of truth. That privilege, like the guarantees of the Fourth Amendment, stands as a protection of quite different constitutional values—values reflecting the concern of our society for the right of each individual to be let alone. To recognize this is no more than to accord those values undiluted respect.

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[13] See n. 12, *supra.*

There can be no doubt of the States' reliance upon the *Twining* rule for more than half a century, nor can it be doubted that they relied upon that constitutional doctrine in the utmost good faith. Two States amended their constitutions so as expressly to permit comment upon a defendant's failure to testify, Ohio in 1912,[14] and California in 1934.[15] At least four other States followed some variant of the rule permitting comment.[16]

Moreover, this reliance was not only invited over a much longer period of time, during which the *Twining* doctrine was repeatedly reaffirmed in this Court, but was of unquestioned legitimacy as compared to the reliance of the States upon the doctrine of *Wolf* v. *Colorado,* considered in *Linkletter* as an important factor militating against the retroactive application of *Mapp.* During the 12-year period between *Wolf* v. *Colorado* and *Mapp* v. *Ohio,* the States were aware that illegal seizure of evidence by state officers violated the Federal Constitution.[17] In the 56 years that elapsed from *Twining* to *Malloy,* by contrast, the States were repeatedly told that comment upon the failure of an accused to testify in a state criminal trial in no way violated the Federal Constitution.[18]

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[14] See n. 2, *supra.*

[15] California Constitution, Art. I, § 13.

[16] See *State* v. *Heno,* 119 Conn. 29, 174 A. 181; *State* v. *Ferguson,* 226 Iowa 361, 372–373, 283 N. W. 917, 923; *State* v. *Corby,* 28 N. J. 106, 145 A. 2d 289; *State* v. *Sandoval,* 59 N. M. 85, 279 P. 2d 850.

[17] In *Wolf* v. *Colorado,* 338 U. S. 25, it was unequivocally determined by a unanimous Court that the Federal Constitution, by virtue of the Fourteenth Amendment, prohibits unreasonable searches and seizures by state officers. "The security of one's privacy against arbitrary intrusion by the police . . . is . . . implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause." 338 U. S., at 27–28.

[18] See, for example, *Scott* v. *California,* 364 U. S. 471, where, as late as December 1960, only a single member of the Court expressed dissent from the dismissal of an appeal challenging the constitutionality of the California comment rule.

The last important factor considered by the Court in *Linkletter* was "the effect on the administration of justice of a retrospective application of *Mapp*." 381 U. S., at 636. A retrospective application of *Griffin* v. *California* would create stresses upon the administration of justice more concentrated but fully as great as would have been created by a retrospective application of *Mapp*. A retrospective application of *Mapp* would have had an impact only in those States which had not themselves adopted the exclusionary rule, apparently some 24 in number.[19] A retrospective application of *Griffin* would have an impact only upon those States which have not themselves adopted the no-comment rule, apparently six in number.[20] But upon those six States the impact would be very grave indeed. It is not in every criminal trial that tangible evidence of a kind that might raise *Mapp* issues is offered. But it may fairly be assumed that there has been comment in every single trial in the courts of California, Connecticut, Iowa, New Jersey, New Mexico, and Ohio, in which the defendant did not take the witness stand—in accordance with state law and with the United States Constitution as explicitly interpreted by this Court for 57 years.

Empirical statistics are not available, but experience suggests that California is not indulging in hyperbole when in its *amicus curiae* brief in this case it tells us that "Prior to this Court's decision in *Griffin*, literally thousands of cases were tried in California in which comment was made upon the failure of the accused to take the stand. Those reaping the greatest benefit from a rule compelling retroactive application of *Griffin* would be [those] under lengthy sentences imposed many years before *Griffin*. Their cases would offer the least likelihood of a successful retrial since in many, if not most, instances, witnesses and evidence are no longer available." There is nothing to suggest that what would be true in California would not also be true in Connecticut, Iowa, New Jersey, New Mexico, and Ohio. To require all of those States now to void the conviction of every person who did not testify at his trial would have an impact upon the administration of their criminal law so devastating as to need no elaboration.

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[19] See *Elkins* v. *United States*, 364 U. S. 206, at 224–225 (Appendix).

[20] See notes 2, 15, and 16, *supra*.

V.

We have proceeded upon the premise that "we are neither required to apply, nor prohibited from applying, a decision retrospectively." *Linkletter* v. *Walker,* 381 U. S., at 629. We have considered the purposes of the *Griffin* rule, the reliance placed upon the *Twining* doctrine, and the effect upon the administration of justice of a retrospective application of *Griffin.* After full consideration of all the factors, we are not able to say that the *Griffin* rule requires retrospective application.

The judgment is vacated and the case remanded to the Court of Appeals for the Sixth Circuit for consideration of the claims contained in the respondent's petition for habeas corpus, claims which that court has never considered.

It is so ordered.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, dissents for substantially the same reasons stated in his dissenting opinion in *Linkletter* v. *Walker,* 381 U. S. 618, at 640.

THE CHIEF JUSTICE took no part in the decision of this case.

MR. JUSTICE FORTAS took no part in the consideration or decision of this case.

BANKS v. CALIFORNIA.

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT.

No. 87, Misc. Decided January 24, 1966.

Certiorari granted; vacated and remanded.

Petitioner *pro se.*

Thomas C. Lynch, Attorney General of California, *Albert W. Harris, Jr.,* Assistant Attorney General, and *Charles W. Rumph,* Deputy Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the District Court of Appeal of California, First Appellate District, for further proceedings in light of *Griffin* v. *California,* 380 U. S. 609.

THE CHIEF JUSTICE took no part in the consideration of this motion and petition.

ODELL v. STATE DEPARTMENT OF PUBLIC WELFARE OF WISCONSIN ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN.

No. 896, Misc. Decided January 24, 1966.

Appeal dismissed.

PER CURIAM.

The appeal is dismissed for want of jurisdiction.

PEW *v.* COMMANDANT, U. S. COAST GUARD.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 824, Misc. Decided January 24, 1966.

Appeal dismissed and certiorari denied.

Appellant *pro se.*

Solicitor General Marshall for appellee.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

ESCALERA *v.* SUPREME COURT OF PUERTO RICO.

APPEAL FROM THE SUPREME COURT OF PUERTO RICO.

No. 849, Misc. Decided January 24, 1966.

Appeal dismissed and certiorari denied.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

CHICAGO & NORTH WESTERN RAILWAY CO. ET AL. *v.* CHICAGO, BURLINGTON & QUINCY RAILROAD CO. ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 751. Decided January 24, 1966.*

242 F. Supp. 414, affirmed.

Jordan Jay Hillman, Bryce L. Hamilton and *John C. Danielson* for appellants in No. 751. *Robert W. Ginnane* and *Leonard S. Goodman* for appellant in No. 752.

Eldon Martin, Robert J. Cooney, Frank S. Farrell, Robert G. Gehrz, William P. Higgins, Curtis H. Berg, John H. Bishop, Louis E. Torinus, Jr., and *Paul M. Sand* for appellees in both cases.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.

MR. JUSTICE FORTAS took no part in the consideration or decision of these cases.

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*Together with No. 752, *Interstate Commerce Commission* v. *Chicago, Burlington & Quincy Railroad Co. et al.*, also on appeal from the same court.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS ET AL. *v.* CHICAGO, ROCK ISLAND & PACIFIC RAILROAD CO. ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS.

No. 69. Argued December 8–9, 1965.—Decided January 31, 1966.*

Appellees, a group of interstate railroads operating in Arkansas, sued in District Court for declaratory and injunctive relief on the ground that two Arkansas statutes which provided for train crews of minimum sizes were unconstitutional. Appellees claimed that as to them the statutes violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the Commerce Clause; that they discriminated against interstate, and favored intrastate, commerce because by exempting lines below certain mileages they excluded from coverage all intrastate railroads but included most of the interstate railroads operating in Arkansas; and that they invaded a legislative field primarily pre-empted by the Federal Government with the enactment in 1963 of Public Law 88–108. That statute provided for compulsory arbitration of then current collective bargaining disputes over the use of railroad firemen and over manning levels for railroad crews and for arbitration awards that were to expire two years after the awards went into effect. A three-judge District Court granted appellees' motion for summary judgment on the single ground that the Arkansas statutes conflicted with Public Law 88–108, which was held to pre-empt the field of regulation. *Held:*

1. Since there were substantial constitutional challenges in this case in addition to the pre-emption issue, it was proper to convene a three-judge District Court, from whose judgment a direct appeal lies to this Court. *Swift & Co.* v. *Wickham, ante,* p. 111, distinguished. P. 428.

2. It was not the legislative purpose of Public Law 88–108 to pre-empt the field of manning-level regulation and supersede States' full-crew laws, nor was that the effect of the statute or of the arbitration awards made thereunder. Pp. 429–437.

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*Together with No. 71, *Hardin et al.* v. *Chicago, Rock Island & Pacific Railroad Co. et al.,* also on appeal from the same court.

(a) As held in *Missouri Pac. R. Co.* v. *Norwood,* 283 U. S. 249, at 256, one of three cases in which this Court upheld the Arkansas statutes against federal pre-emption charges, Congress in the absence of a clearly expressed purpose, will not be held to have intended to prevent exercise of the States' police power to regulate crew sizes. P. 429.

(b) The problem of railroad manning levels, and particularly whether or not retention of firemen is necessary, has led to constant collective bargaining disputes between the railroads and unions. Public Law 88–108 was enacted to deal with such a dispute which began in 1959 and by 1963, despite various settlement efforts, reached an impasse which threatened to result in a nationwide strike. Pp. 429–431.

(c) The statute was intended to deal with that emergency on a temporary basis only and was not designed either permanently to supplant collective bargaining over manning levels or to supersede state full-crew laws. Pp. 431–437.

3. The record in this case does not support a conclusion that the mileage bases fixed for application of the statutes were irrational and discriminatory. Pp. 437–438.

4. The cause is remanded to the District Court for consideration of the constitutional issues not yet decided. P. 438.

239 F. Supp. 1, reversed and remanded.

James E. Youngdahl argued the cause for appellants in No. 69. With him on the briefs was *Eugene F. Mooney. Jack L. Lessenberry* argued the cause for appellants in No. 71. With him on the brief was *Bruce Bennett,* Attorney General of Arkansas.

Robert V. Light and *Dennis G. Lyons* argued the cause for appellees in both cases. With them on the brief were *Thurman Arnold, W. J. Smith, H. H. Friday* and *R. W. Yost.*

Briefs of *amici curiae,* urging reversal, were filed by *Bronson C. La Follette,* Attorney General, and *Beatrice Lampert,* Assistant Attorney General, for the State of Wisconsin; by *John J. O'Connell,* Attorney General, and *Frank P. Hayes, James R. Cunningham* and *Paul*

Coughlin, Assistant Attorneys General, for the State of Washington; and by the following Attorneys General for their respective States: *Arthur K. Bolton* of Georgia, *John J. Dillon* of Indiana, *Jack P. F. Gremillion* of Louisiana, *Forrest H. Anderson* of Montana, *Frank L. Farrar* of South Dakota, and *Waggoner Carr* of Texas.

Briefs of *amici curiae,* urging affirmance, were filed by *William P. Rogers, Robert M. Lane, Gerald E. Dwyer, Victor F. Condello, Jordan Jay Hillman, Joseph S. Gill* and *Woodrow L. Taylor* for Associated Railways of Indiana et al., and by *Francis M. Shea, Richard T. Conway, William H. Dempsey, Jr., Ralph J. Moore, Jr., James R. Wolfe* and *Charles I. Hopkins, Jr.,* for the National Railway Labor Conference.

Opinion of the Court by MR. JUSTICE BLACK, announced by MR. CHIEF JUSTICE WARREN.

Appellees, a group of interstate railroads operating in Arkansas, brought this action in a United States District Court asking that court to declare two Arkansas statutes unconstitutional and to enjoin two Arkansas Prosecuting Attorneys, appellants here, from enforcing or attempting to enforce the two state statutes. The railroad brotherhoods, also appellants here, were allowed to intervene in the District Court in order to defend the validity of the state statutes. One of those statutes, enacted in 1907, makes it an offense for a railroad operating a line of more than 50 miles to haul freight trains consisting of more than 25 cars without having a train crew consisting of not "less than an engineer, a fireman, a conductor and three brakemen . . . ."[1] The second statute challenged by the railroads, enacted in 1913, makes it an offense for any railroad operating with lines 100 miles or more in length to engage in switching activities in cities of designated populations, with "less than one [1] engineer, a fireman, a foreman and three [3] helpers. . . ."[2] The complaint charged that, as applied to the plaintiff railroads, both statutes (1) operate in an "arbitrary, capricious, discriminatory and unreasonable" manner in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment; (2) unduly interfere with, burden and needlessly increase the cost of interstate commerce in violation of the Commerce Clause, Art. I, § 8, cl. 3, of the Constitution, and contrary to the National Transportation Policy expressed in the Interstate Commerce Act; (3) discriminate against interstate commerce in favor of local or intrastate commerce; and (4) by seeking to regulate and control the number of persons working on interstate railroad locomotives and cars invade a field of legislation pre-empted by the Federal Government primarily through federal enactment of Public Law 88–108 passed by Congress in 1963.[3] This law was passed to avert a nationwide railroad strike threatened by a labor dispute between the national railroads and the brotherhoods over the number of employees that should be used on trains.

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[1] Ark. Laws 1907, Act 116, Ark. Stat. Ann. §§ 73-720 through 73-722 (1957).

In their complaint the railroads admitted that this Court had on three separate occasions, in 1911,[4] in 1916,[5] and again in 1931,[6] sustained the constitutionality of both state statutes against the same Fourteenth Amendment and Commerce Clause challenges made in the present action. The complaint alleged, however, that improvements have now been so great in locomotives, freight cars, couplers, brakes, trackage, roadbeds, and operating methods that the facts on which the prior holdings rested no longer exist. The brotherhoods and the two defendant Prosecuting Attorneys answered the complaint asserting the constitutionality of the Acts and denying that there had been a change in conditions so significant as to justify any departure from this Court's prior decisions. The brotherhoods' answer alleged that modern developments had actually multiplied the dangers of railroading thus making the Arkansas statutes more necessary than ever. The pleadings therefore, at least to some extent, presented factual issues calling for the introduction and determination of evidence under prior holdings of this Court. See, *e. g., Southern Pacific Co.* v. *Arizona*, 325 U. S. 761. At this stage of the trial, however, the railroads, claiming there was no substantial dispute in the evidence with reference to any relevant issues, filed a motion for summary judgment under Rule 56, Fed. Rules Civ. Proc. alleging that: (1) Both state statutes are "pre-empted by federal legislation in conflict therewith, to-wit: Public Law 88–108 and the award of Arbitration Board No. 282 pursuant thereto; the Railway Labor Act . . . ; and the Interstate Commerce Act . . . particularly the preamble thereto"; (2) the state statutes constitute discriminatory legislation against interstate commerce in violation of the Commerce Clause; and (3) the state statutes deny the railroads equal protection of the laws in violation of the Fourteenth Amendment. Without hearing any evidence the three-judge court convened to consider the case sustained the railroads' motion for summary judgment, holding, one judge dissenting, that the Arkansas statutes are "in substantial conflict with Public Law 88–108 . . . and the proceedings thereunder, and are therefore unenforceable against the plaintiffs . . . ." 239 F. Supp. 1, 29. The District Court did not purport to rule on the other questions presented in the motion for summary judgment and the complaint. We noted probable jurisdiction, 381 U. S. 949.

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[2] Ark. Act 67 of 1913, Ark. Stat. Ann. §§ 73–726 through 73–729 (1957).

[3] 77 Stat. 132, 45 U. S. C. following § 157 (1964 ed.).

[4] *Chicago, R. I. & P. R. Co.* v. *Arkansas*, 219 U. S. 453.

[5] *St. Louis, I. M. & S. R. Co.* v. *Arkansas*, 240 U. S. 518.

[6] *Missouri Pac. R. Co.* v. *Norwood*, 283 U. S. 249, 290 U. S. 600. See also latter case below, 13 F. Supp. 24.

A few weeks ago this Court held in *Swift & Co.* v. *Wickham, ante,* p. 111, that an allegation that a state statute is pre-empted by a federal statute does not allege the unconstitutionality of the state statute so as to call for the convening of a three-judge court under 28 U. S. C. § 2281 (1964 ed.). Thus, under *Swift,* the pre-emption issue in this case standing alone would not have justified a three-judge court, and hence would not have justified direct appeal to us under 28 U. S. C. § 1253 (1964 ed.). The complaint here, however, also challenged the Arkansas statutes as being in violation of the Commerce, Due Process, and Equal Protection Clauses. In briefs submitted to us after oral argument the appellants have argued that all these constitutional challenges are so insubstantial as a matter of law that they are insufficient to make this an appropriate case for a three-judge court. We cannot accept that argument. Whatever the ultimate holdings on the questions may be we cannot dismiss them as insubstantial on their face. Nor does the fact that the pre-emption issue alone was passed on by the District Court keep this from being a three-judge case. Had all the issues been tried by the District Court and had that court enjoined enforcement of the state laws on pre-emption alone, we would have had jurisdiction of a direct appeal to us under 28 U. S. C. § 1253 (1964 ed.). *Florida Lime & Avocado Growers, Inc.* v. *Jacobsen,* 362 U. S. 73. The same is true here where the state laws were enjoined on the basis of pre-emption but the other constitutional challenges were left undecided. Thus we have jurisdiction and so proceed to the merits.

I.

We first consider the question of pre-emption. Congress unquestionably has power under the Commerce Clause to regulate the number of employees who shall be used to man trains used in interstate commerce. In the absence of congressional legislation on that subject, however, the States have extensive power of their own to regulate in this field, particularly to protect the safety of railroad employees and the public. This Court said in *Missouri Pac. R. Co.* v. *Norwood,* one of the previous decisions upholding the constitutionality of these Arkansas statutes, that:

> "In the absence of a clearly expressed purpose so to do Congress will not be held to have intended to prevent the exertion of the police power of the States for the regulation of the number of men to be employed in such crews." 283 U. S., at 256.

See also the same case, 290 U. S. 600.

In view of *Norwood* and the two preceding cases, all of which sustained the constitutionality of the Arkansas statutes over charges of federal pre-emption, the question presented to this Court is whether in adding the 1963 compulsory arbitration Act to previous federal legislation, Congress intended to pre-empt this field and supersede state legislation like that of Arkansas, or, stated another way, whether application of the Arkansas law "would operate to frustrate the purpose of the [1963] federal legislation." *Teamsters Union* v. *Morton,* 377 U. S. 252, 258.

Since the railroad unions first gained strength in this country the problem of manning trains has presented an issue of constant dispute between the railroads and the unions. Some States, such as Arkansas, believing perhaps that many railroads might not voluntarily assume the expense necessary to hire enough workers for their trains to make the operations as safe as they could and should be, passed laws providing for the minimum size of the train crews. Where these laws were not in effect the question of the size of the crews was settled by collective bargaining, though not without great difficulty. It was this sensitive and touchy problem which brought on the explosive collective bargaining impasse that triggered the 1963 Act which the railroads now contend was intended to permanently supersede the 1907 and 1913 Arkansas statutes. Such a permanent supersession would, of course, amount to an outright repeal of the statutes by Congress.

The particular dispute which eventually led to the enactment of Public Law 88-108 began in 1959 when the Nation's major railroads notified the brotherhoods that they considered it to be the right of management to have the unrestricted discretion to decide how many employees should be used to man trains, and that they did not intend to submit that subject to collective bargaining in the future. The brotherhoods protested, serving counterproposals on the railroads. As a result the representatives of each side met to try to negotiate a new collective bargaining agreement. On the question of the size of the crews the negotiators stuck and would not budge. The railroad negotiators insisted that changed conditions, particularly the substitution of diesel and electrically propelled engines for steam engines, had made firemen completely unnecessary employees. They continued to insist that the railroads should be left free to decide for themselves when and how many firemen should be used, if any at all. Throughout all negotiations, and up to now, the brotherhoods have insisted that a fireman is needed even on a diesel engine, particularly to aid the engineer as a lookout for safety purposes, and to help make needed repairs and adjustments while the train is moving, should the engine for any reason fail to function. Agreement on this question proving impossible in the 1959 negotiations, President Eisenhower, acting at the request of both sides, appointed a Presidential Commission to try to adjust the dispute. After long investigation and consideration the Commission reported. Its report was unsatisfactory to the brotherhoods, not wholly satisfactory to the railroads, and did not result in any settlement. The dispute dragged on. Another report was made by the President's Advisory Committee on Labor-Management Policy but it also failed to bring about an agreement.

All efforts at agreement having failed, President Kennedy, on July 22, 1963, reported to Congress that on July 29 the railroads "can be expected to initiate work rules changes . . . . And the brotherhoods thereupon can be expected to strike." "This Nation," he said, "stands on the brink of a nationwide rail strike that would, in very short order, create widespread economic chaos and distress." Pointing out the disastrous consequences that might occur to the country should a strike take place, the President recommended legislation to provide "for an interim remedy while awaiting the results of further bargaining by the parties." He recommended that "for a 2-year period during which both the parties and the public can better inform themselves on this problem . . . interim work rules changes proposed by either party to which both parties cannot agree should be submitted for approval, disapproval or modification to the Interstate Commerce Commission in accordance with the procedures and provisions of section 5 of the Interstate Commerce Act . . . ." President Kennedy repeatedly emphasized to the Congress his hope that the dispute could eventually be settled by collective bargaining. He stated his belief that advances in railroad technology had made it necessary to reduce the railroad labor force, but he insisted that the public should help bear the burden of this reduction in order that it not fall entirely on those employees who would lose their jobs. He warned the Congress that it was highly necessary " 'for workers to enjoy reasonable protection against the harsh effects of too sudden change.' " In his message the President expressed no desire to have Congress pass a law that would finally and completely dispose of the problem of the number of men who should man the crew of a train, but instead warned that "It would be wholly inappropriate to make general and permanent changes in our labor relations statutes on this basis" and that any " 'revolutionary changes even for the better carry a high price in disruption . . . (that) might exceed the value of the improvements.' " Thus the President's message did not in any way indicate a purpose on his part to disturb the existing pattern of full-crew laws by supersession of them, either temporarily or permanently.

Congress enacted the bill proposed by the President with one significant change. He had recommended that a binding determination of the issues not resolved by collective bargaining be made by the Interstate Commerce Commission. At least one brotherhood witness testified before the Senate Commerce Committee to an apprehension that the Interstate Commerce Commission if given the power requested would declare States' full-crew laws superseded by orders of the Commission.[7] Subsequent to this both the House and Senate Committees dropped a section of the proposed bill that would have vested power in the Commission to make binding settlements.[8] Instead of that section the Act passed by Congress provided for establishment of an arbitration board to consist of seven members, two appointed by the railroads, two by the unions and three to be appointed by the President should the four members named by the railroads and unions fail to agree among themselves on an additional three. The arbitration board was given power to resolve the dispute over the firemen and full-crew questions. Their award was to be a complete and final disposition of these issues for a period not exceeding two years from the date the awards would take effect. Awards were made by such a board which the railroads now claim call for supersession of the state laws. We hold that neither the Act itself nor the awards made under it can have such an effect.

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[7] Hearings before Senate Committee on Commerce on S. J. Res. No. 102, 88th Cong., 1st Sess., 629.

[8] S. Rep. No. 459, 88th Cong., 1st Sess., 9.

The text of the Act and the awards made under it contain no section specifically pre-empting the States' full-crew laws nor is there any specific saving clause indicating lack of intent to pre-empt them. Appellees argue, however, that the terms of the Act and the awards are inconsistent with the operation of the state laws and thus the laws are no longer valid. But Congress wanted to do as little as possible in solving the dispute which was before it, and we note that this dispute was not over the size of crews in States which had full-crew laws, for there the size of crews was regulated by statute and not by collective bargaining agreements. The railroads made this very point before the Senate Commerce Committee when a spokesman for three railroads, in commenting on the few jobs that would be lost if the brotherhoods accepted the railroads' proposal, said, "25.9 percent of the firemen positions in freight and yard service must be maintained because of the provisions of so-called full-crew laws of the States of [listing 13 States including Arkansas]."[9] It appears, therefore, that Congress did not need to pre-empt the state laws in order to eliminate this collective bargaining impasse, and further examination of the legislative history of Public Law 88–108 confirms our view that Congress had no intention of superseding the state full-crew laws by passage of that Act.

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[9] Hearings before the Senate Committee on Commerce on S. J. Res. No. 102, 88th Cong., 1st Sess., 707.

The President's proposal was interpreted and explained to the House Committee on Interstate and Foreign Commerce by the Secretary of Labor. On the subject of state full-crew laws he told that Committee:

> "I call attention to such statements as those of the *Missouri Railroad Company* v. *Norwood,* the Supreme Court case in 1930 in which the Court said, 'In the absence of a clearly stated purpose so to do Congress will not be held to have intended to prevent the assertion of the police power of the States for the regulation of the number of men to be employed in such crews.' It would be the intention reflected here that the issuance of an interim ruling, subject to termination in a time period or at the agreement of the parties, would not have the effect of affecting any State full crew law."[10]

The Chairman of the House Committee on several occasions emphatically stated both in the hearings and on the House floor that the bill was not intended, either as proposed or as passed, to supersede state laws. On one occasion he said:

> "This issue was raised in the course of the hearings before the committee. Questions were asked of the various people representing management and the labor industry and witnesses representing the labor brotherhoods, the employees' representatives, and the Secretary of Labor. It was made rather clear in the course of the hearings that it would in no way affect the provisions of State laws. The committee in executive session discussed the question

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[10] Hearings before the House Committee on Interstate and Foreign Commerce on H. J. Res. No. 565, 88th Cong., 1st Sess., 78.

> and concluded that it was not the intent of the committee in any way to affect State laws. On page 14 of the committee report we included, in order that this history might be made, this language: 'The committee does not intend that any award made under this section may supersede or modify any State law relating to the manning of trains.'"[11]

The Chairman of the Committee then went on to tell the House, after referring to this Court's holding in *Missouri Pac. R. Co.* v. *Norwood,*

> "Therefore, since this bill does not mention the subject of State laws, and since, as the committee report shows, we do not intend to affect these laws, I am confident they are not affected by the bill.
>
> "I think that is about as clear as we can make it."

Many statements like those quoted above point to the fact that both the Senate and the House members did not intend by enacting Public Law 88-108 to supersede state laws. This sentiment was voiced by witnesses representing both labor and railroads as well as by public officials of the Nation. The railroads seek to offset these carefully considered expressions by reference to a single incident. On one of the occasions when Representative Harris, Chairman of the House Committee reporting the bill, had stated that the Act would not supersede the state law, Representative Smith of Virginia, Chairman of the Rules Committee of the House, interrupted Representative Harris to make the statement set out below.[12]

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[11] 109 Cong. Rec. 16122 (1963). See also the Committee Report referred to by Chairman Harris, H. R. Rep. No. 713, 88th Cong., 1st Sess., 14.

[12] "Mr. SMITH of Virginia. Mr. Speaker, the colloquy between the gentleman from California [Mr. SISK], and the chairman of the Committee on Interstate and Foreign Commerce, the gentleman from Arkansas [Mr. HARRIS], raises a question that has not previously been discussed on the floor of the House. It was discussed in the

This single statement by Congressman Smith was hardly enough to cast doubt in the minds of the members of the House as to the accuracy of the statement made by Congressman Harris, Chairman of the Committee which reported the bill. The substance of Congressman Smith's statement was:

> "I think the provisions of the Constitution are such and the decisions of the courts are such that there is no way in which a State can overcome the power of the Federal Government under the interstate commerce clause."

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committee yesterday before the Committee on Rules. I do not like to remain silent in view of the statement that a State law can overcome the constitutional provision which gives exclusive jurisdiction to the Federal Government in matters of interstate commerce. I do not know what precedents may have been found with reference to this question, but of course, in the matter of purely intrastate commerce under our Constitution the State, of course, would have authority, but when it comes to dealing with interstate commerce I think the provisions of the Constitution are such and the decisions of the courts are such that there is no way in which a State can overcome the power of the Federal Government under the interstate commerce clause.

"I simply wanted to make my own position clear with reference to that question, for whatever it may be worth.

"Mr. EDMONDSON. Mr. Speaker, will the gentleman yield?

"Mr. SMITH of Virginia. I yield to the gentleman from Oklahoma.

"Mr. EDMONDSON. I thank the distinguished chairman of the Committee on Rules for yielding to me at this point. Would this not mean in effect that about the only kind of train operation in which State laws would prevail would be in the switching of cars involving switch engine operations?

"Mr. SMITH of Virginia. Of course, it is just a question of what is or what constitutes interstate commerce. Now, as you know, the decisions of the courts and the actions of the Congress have gone a long way in putting almost everything under interstate commerce." 109 Cong. Rec. 16122 (1963).

This statement was, of course, correct but it has little relevance as to whether the bill was intended to exercise the power of the Federal Government to supersede state laws.

In the face of the clear congressional history of this Act we could not hold that either the Act itself or the arbitration awards made under it supersede the Arkansas state laws.

II.

The railroads contend that the District Court would have been justified in holding the two Arkansas Acts unconstitutional on the second ground of their motion for summary judgment which is that the two Acts "constitute discriminatory legislation against interstate commerce in favor of intrastate commerce." Aside from the fact that such an argument was apparently rejected in the prior cases upholding the constitutionality of the Arkansas statutes we think it is wholly without merit. The argument is based on the fact that the 1907 state law exempts railroads with less than 50 miles of track and the 1913 law exempts railroads with less than 100 miles of track. None of the State's 17 intrastate railroads have more than 50 miles of track. It turns out that none of them are subject to either of the two state laws while 10 of the 11 interstate railroads are subject to the 1907 Act and eight of them are subject to the 1913 Act. It is impossible for us to say as a matter of law that this difference in treatment by the State, based on the differing mileage of railroads, is without any rational basis as the railroads contend. Certainly some regulations based on different mileage of railroads might be wholly rational, reasonable, and desirable. We cannot say on the record now before us that classification according to the length of mileage in these two statutes constitutes discrimination against interstate commerce in violation of the Commerce Clause or the Equal Protection Clause. See *Florida Lime & Avocado Growers, Inc.* v. *Paul,* 373 U. S. 132, 137.

The judgment of the District Court is reversed and the cause is remanded to that court for consideration of the constitutional issues left undecided by its previous judgment.

It is so ordered.

MR. JUSTICE FORTAS took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS, dissenting.

We all agree that Congress has ample power to regulate the number of employees used to man railroad trains operating in interstate commerce. Unlike the majority, however, I believe that Congress has exercised that power, and respectfully dissent from the Court's conclusion to the contrary.

The bargaining impasse which prompted the passage of Public Law 88-108 (77 Stat. 132) represented, in a sense, only the exposed top of a large iceberg. Lurking beneath the surface of the controversy were the twin problems of automation and technological unemployment. Congress was well aware of the developing conflict between innovation and job security. When President Kennedy sought a legislative solution to the pending crisis in the railroad industry, he reminded Congress that:

> ". . . this dispute over railroad work rules is part of a much broader national problem. Unemployment, whether created by so-called automation, by a shift of industry to new areas, or by an overall shortage of market demand, is a major social burden.
>
> . . . . .
>
> "This problem is particularly but not exclusively acute in the railroad industry. Forty percent fewer

> employees than were employed at the beginning of this decade now handle substantially the same volume of rail traffic. The rapid replacement of steam locomotives by diesel engines for 97 percent of all freight tonnage has confronted many firemen, who have spent much of their career in this work, with the unpleasant prospect of human obsolescence. . . . The Presidential Commission was established in part, it said, because of the need to close the gap between technology and work." (See Hearings before Senate Committee on Commerce on S. J. Res. 102, 88th Cong., 1st Sess., 11–12.)

The Presidential Railroad Commission to which President Kennedy referred was established by President Eisenhower's order in 1960,[1] and was charged with investigating the dispute which arose out of the railroads' proposed elimination of firemen on diesel engines, and the reduction of the number of other crew members, in freight and yard service. After an extensive study, the Commission issued its report containing detailed findings on all aspects of the dispute. The Commission's recommendations included the elimination of firemen on diesels in freight service and the reduction of the number of brakemen and switchmen. It recommended financial benefits for those separated from service.

This Presidential Railroad Commission was well aware that, however desirable might be a nationwide solution to the problem, the continued existence of state "full crew" laws made this impossible:

> "[M]ost of the legislation of this kind was enacted prior to 1920. These laws apparently fail to envision modern railroad operations. We feel that our recommendations with respect to this issue should have nationwide application. We recognize that

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[1] Executive Order No. 10891, Nov. 1, 1960.

> there will be difficulty in applying the rule recommended by us in States where 'full crew' laws have been enacted. How the restriction of those laws may be lifted, however, is a matter which goes beyond our charge." [2]

Then came Public Law 88–108, § 3 of which empowers the Board to "resolve the matters on which the parties were not in agreement" and to make a binding award which "shall constitute a complete and final disposition of the . . . issues." Section 7 (a) lays down standards for the Board:

(1) "[T]he effect of the proposed award upon adequate and safe transportation service";

(2) "[T]he effect of the proposed award upon . . . the interests of the carrier and employees affected"; and

(3) "[D]ue consideration to the narrowing of the areas of disagreement which has been accomplished in bargaining and mediation."

Today the Court concludes that Congress sought only to shear off the visible portion of the iceberg, leaving the continued existence of state "full crew" laws as a bar to the resolution of these matters.

That the state statutes in question conflict with the federal arbitration awards is plain. Congress directed the National Arbitration Board to resolve the dispute as to the necessity of firemen on diesel freights and as to the minimum size of train and switching crews. The Board has declared that, in general, firemen are not to be required. And through local boards, the number of brakemen, switchmen, and helpers to be used in various operations is fixed.[3] These state laws, however, compel the use of firemen in virtually all interstate operations and fix the size of train crews at levels usually exceeding those fixed by the local awards.[4] States lacking such laws are, in light of the Court's decision, free to enact them and thereby, in effect, imperil Public Law 88-108 and the arbitration awards made under it. This Court has held that a state statute must fall in the face of an inconsistent provision in a collective bargaining agreement negotiated pursuant to the command of federal law, *Teamsters Union* v. *Oliver,* 358 U. S. 283, even though Congress did not prescribe the particular terms of the agreement. And see *California* v. *Taylor,* 353 U. S. 553. We have here something more than collective bargaining agreements. These arbitration awards are binding directives, resolving a labor-management dispute, issued under the direction and authority of Congress.

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[2] Report of the Presidential Railroad Commission (1962), at p. 64.

[3] The national award provided for the elimination of 90% of the firemen's jobs in each local seniority district, except that firemen would in all cases be required on yard locomotives lacking a "deadman" control. In addition, jobs had to be made available to fire-

The problems submitted to the Arbitration Board concerned primarily two central issues: (1) continued use of firemen on diesel-electric or electric locomotives which do not use steam power, and on which the work of firing

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men retained in service pursuant to the employment protective provisions of the award which, in general, provided that any fireman with 10 years' seniority had to be retained either as a fireman or an engineer. Firemen with between two and 10 years' seniority had to be retained in engine service or offered a comparable position.

As for brakemen and switchmen, the award established procedures for binding local arbitration whereby the number of other crew members might be fixed on a local basis, subject to certain employment protective conditions established by the national Board. The applicable local awards for Arkansas railroad operations provide for two brakemen on main-line operations and one brakeman on branch-line operations. In switching operations, the local awards provide, with certain exceptions, for one helper.

[4] Thus Arkansas law requires a fireman on every train, with certain exceptions, while the arbitration award permits abolition of 90% of the firemen's positions. Arkansas requires three brakemen while the arbitration award requires no more than two. Similar conflicts appear in respect to the yard operations.

boilers need not be performed; (2) the makeup or "consist" of train service crews in road and yard. These are matters recognized by the Board as governed in some States "by statute or administrative decision." Indeed, a resolution of them in many situations might involve overriding or disregarding conflicting local regulations. Any realistic view of the scope and nature of the impasse the parties had reached would necessarily endow the Board with power to resolve conflicts between what it deemed to be the desirable national policy on the one hand and conflicting state laws on the other.

The issues were far-reaching; they included questions in the realm of economics, of railroad technology, and of sociology. This was a controversy that years of collective bargaining, study, informed analysis, persuasion, and debate had not been able to resolve. The Board's seven members[5] held 29 days of hearings, received the testimony of more than 40 witnesses recorded in nearly 5,000 pages of transcript, examined more than 200 documentary exhibits, and made inspection trips to four railroad yards in the Chicago area. Its award[6] was concurred in by the two carrier members and dissented from by the labor members.[7] The opinion of the neutral members of the Board details the conclusions the panel reached. It states, as to the question of firemen, that:

> "although we think it clear that firemen are presently performing useful services, we agree with the

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[5] The Chairman of the Board was Ralph T. Seward. The other two neutral members were Benjamin Aaron and James J. Healy. Representing the carriers were Guy W. Knight and J. E. Wolfe. Representing the labor organizations were H. E. Gilbert and R. H. McDonald.

[6] See note 3, *supra*.

[7] The carrier members, while "disappointed with certain of [the] provisions" of the award, noted the "care and diligence" which the Board had displayed in reaching its decision. The labor members contended that the Board had not been true to the congressional command and that its conclusions were erroneous.

> [Presidential Railroad] Commission 'that firemen-helpers are not so essential for the safe and efficient operation of road freight and yard diesels that there should continue to be either a national rule or local rules requiring their assignment on all such diesels.' "[8]

The Board found, in respect to the other members of the train crew, that "the consist of crews necessary to assure safety and to prevent undue workloads must be determined primarily by local conditions. A national prescription of crew size would be wholly unrealistic." The Board established procedures for local arbitration of these issues. And, the Board added,

> "It is clear from the evidence before us that the myriad of local arrangements has led to numerous inconsistencies in the manning of crews. It is equally clear that some of the existing rules, originating as they did more than a half-century ago, are anachronistic and do not reflect the present state of railroad technology and operating conditions."

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[8] The opinion states that the "lookout function presently assigned to the fireman is also performed by the head brakeman in road freight service and by all members of the train crew in yard service. In the great majority of cases the lack of a fireman to perform the related functions of lookout and signal passing will not endanger safety or impair efficiency because these functions can be, as they are now, performed by other crew members."

The mechanical duties performed by firemen, the Board found, could in large part "be performed by the engineer while the locomotive is in service and by shop maintenance personnel at other times."

Finally, the Board found that relief of the engineer by the fireman is of critical importance only in the event of sudden incapacitation. "In road freight service the usual presence of the head brakeman in the cab obviates the need for a fireman in such an emergency."

The Board's concern with safety is apparent from a reading of the neutral members' opinion. As that opinion puts it:

> "It may be fairly stated that concern with safety has pervaded this entire proceeding. It was apparent in the presentations and arguments by all the organizations and by the carriers, and was further emphasized by the inquiries which members of the Board directed to witnesses and counsel."

We are in no position, of course, to pass judgment on the work of the Arbitration Board, nor is it our function to do so. But it is apparent that this panel had the power and the tools to resolve the controversy. Its award constitutes a national solution to the question of firemen and establishes the procedures, already utilized in respect to these railroads operating in Arkansas, for resolution of the crew consist issue.

I conclude that the effect of Public Law 88–108 and the awards made pursuant to it was to supersede state "full crew" legislation. Of course, were the intent of Congress shown to be otherwise, that would be dispositive. Unlike the majority, I do not think that the bits and pieces of legislative debate cited in the Court's opinion can be regarded as a controlling statement of legislative intent. If anything, the legislative history of Public Law 88–108 suggests that Congress refused to accept the suggestion that, if it wished to avoid the supersession of state "full crew" laws, it should expressly say so.

The majority points to statements made by Congressman Harris, Chairman of the House Committee on Interstate and Foreign Commerce, to the effect that the bill would have no effect on state laws. But when he stated his conclusion on the floor of the House, he was immediately challenged by Congressman Smith, Chairman of the Rules Committee. Under the circumstances, it seems inappropriate to regard Congressman Harris' views as wholly authoritative. The testimony of Secretary Wirtz, also referred to by the Court, was followed by a legal memorandum submitted by the Secretary. This memorandum suggests that the Interstate Commerce Commission would, under the proposed legislation, have the power to supersede state legislation, and that to avoid this the Commission might expressly provide to the contrary in its orders.[9]

The absence of an express disclaimer of intent to supersede state laws was called to the attention of Congress. Testifying before the House Committee, Secretary Wirtz did so.[10] The General Counsel of the Interstate Commerce Commission told the Committee that if "the Congress wants to be doubly certain, for example, that no such legal consequence follows it could be done" by expressly stating that no supersession is intended.[11] To this the Chairman responded:

> "I appreciate your very frank response, because I think it has sort of been left up in the air as to what

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[9] See Hearings before House Committee on Interstate and Foreign Commerce on H. J. Res. No. 565, 88th Cong., 1st Sess., 112–113. The reference to the Interstate Commerce Commission was made, of course, because at that stage Congress was considering the legislation in the form proposed by the President, which contemplated resolution of the dispute by the Commission.

The report of the Committee reflects the view of its Chairman and states that state full-crew laws would not be superseded. H. R. Rep. No. 713, 88th Cong., 1st Sess., 14. It bears repeating that this position was challenged by Congressman Smith on the floor of the House. And it is also significant that the report of the Senate Commerce Committee (S. Rep. No. 459, 88th Cong., 1st Sess.) makes no mention of the pre-emption question, despite references to it in the Committee's hearings. See note 13 and accompanying text and note 14, *infra*.

[10] See Hearings before House Committee on Interstate and Foreign Commerce on H. J. Res. 565, 88th Cong., 1st Sess., 111.

[11] *Id.*, at p. 614.

> the courts might do. There has been expression as to what is intended and what some might have thought but I think we also have to provide clarity wherever it is necessary in order that the Commission may have guidance in its effort to carry out the responsibility should it so be directed." [12]

The Commission's General Counsel testified to the same effect before the Senate Commerce Committee:

> "If it were desired to make that absolutely certain, if that is the desire of Congress, it can be done by just a phrase . . . ." [13]

Despite this advice, Congress did not include a "saving" clause.[14]

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[12] *Ibid.*

[13] Hearings before Senate Committee on Commerce on S. J. Res. No. 102, 88th Cong., 1st Sess., 401.

[14] The possibility that the bill would result in the supersession of state laws was noted at other points in the Senate Commerce Committee hearings. A representative of the Brotherhood of Locomotive Engineers testified:

"Mr. DAVIDSON. Mr. Chairman, I was just handed a note that I would like to read into the record, if I may.

"Senator PASTORE. All right.

"Mr. DAVIDSON. General Counsel for the ICC, at the House hearing today, stated if this bill passes, the Commission would have jurisdiction over States' minimum crew bills.

"Senator PASTORE. I don't want to pass any judgment on that. You have read it into the record. I will check that." *Id.*, at 478.

The General Counsel of the Railway Labor Executives' Association testified: "I certainly visualize that as a bare minimum the carriers will contend that the effect [of] orders of the Commission authorizing decreases in crew consist—either of enginecrew or traincrew—would operate to overrule full crew laws in those States that have them. Perhaps that explains the alacrity with which the carriers embraced the President's recommendation and endorsed it." *Id.*, at 629.

As stated by the District Court: "A complete review of the legislative history will reveal that some members of Congress thought

Congress was faced, at the time it enacted Public Law 88–108, with more than the threat of a crippling strike. It had before it the recommendations of the Presidential Railroad Commission. It had been told by the President of the seriousness of the problem of technological unemployment arising from automation. Congress responded by establishing a procedure for resolution of the railroad industry's pressing economic problem with ample consideration of the "safety" issue. It is inconceivable that Congress intended to solve only part of the problem when it directed the Arbitration Board to make a binding award which "shall constitute a complete and final disposition of the . . . issues."

In sum, I agree with District Court that, "There is nothing in the Act itself or in the history that indicates that the Congress intended to resolve this problem of national magnitude by legislation that would be effective in only some 30 states that do not regulate crew consists by law or administrative regulation." 239 F. Supp. 1, 23.

Although automation was a prime concern of the President and the Congress, the Court holds that the lawmakers cloaked their concern in such weasel-like words as not to reach the roots of the problem. With all respect, I dissent.

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that the legislation would pre-empt state crew consist laws, and others thought it would not. It is perfectly clear that the Committees in both Houses had it brought effectively to their attention that the legislation might have a pre-empting effect, and if such pre-emption was not the desire and intention of the Congress, it should so expressly state in the bill. There was no such expression although the bill was amended in many other respects after the hearings before both Committees had been concluded." 239 F. Supp., pp. 22–23.

UNITED STATES *v.* CALIFORNIA.

No. 5, Original. Decided June 23, 1947, and May 17, 1965.—Order and Decree Entered October 27, 1947.—Supplemental Decree Entered January 31, 1966.

The motion by the United States for the entry of a supplemental decree is granted and a supplemental decree is entered.

Opinions reported: 332 U. S. 19, 381 U. S. 139; order and decree reported: 332 U. S. 804.

Solicitor General Marshall, Louis F. Claiborne and *George S. Swarth* for the United States.

Thomas C. Lynch, Attorney General of California, *Jay L. Shavelson,* Assistant Attorney General, *Richard H. Keatinge,* Special Assistant Attorney General, and *Warren J. Abbott* and *N. Gregory Taylor,* Deputy Attorneys General, for the State of California.

PER CURIAM.

In accordance with the Court's opinion in *United States* v. *California,* 381 U. S. 139, proposed decrees have been submitted by the parties. The Court has examined such proposed decrees and the briefs and papers submitted in support thereof, and enters the following decree:

Supplemental Decree.

The United States having moved for entry of a supplemental decree herein, and the matter having been referred to the late William H. Davis as Special Master to hold hearings and recommend answers to certain questions with respect thereto, and the Special Master having held such hearings and having submitted his report, and the issues having been modified by the supplemental complaint of the United States and the answer of the

State of California thereto, and the parties having filed amended exceptions to the report of the Special Master, and the Court having received briefs and heard argument with respect thereto and having by its opinion of May 17, 1965, approved the recommendations of the Special Master, with modifications, it is ORDERED, ADJUDGED AND DECREED that the decree heretofore entered in this cause on October 27, 1947, 332 U. S. 804, be, and the same is hereby, modified to read as follows:

1. As against the State of California and all persons claiming under it, the subsoil and seabed of the continental shelf, more than three geographical miles seaward from the nearest point or points on the coast line, at all times pertinent hereto have appertained and now appertain to the United States and have been and now are subject to its exclusive jurisdiction, control and power of disposition. The State of California has no title thereto or property interest therein.

2. As used herein, "coast line" means—

(a) The line of mean lower low water on the mainland, on islands, and on low-tide elevations lying wholly or partly within three geographical miles from the line of mean lower low water on the mainland or on an island; and

(b) The line marking the seaward limit of inland waters.

The coast line is to be taken as heretofore or hereafter modified by natural or artificial means, and includes the outermost permanent harbor works that form an integral part of the harbor system within the meaning of Article 8 of the Convention on the Territorial Sea and the Contiguous Zone, T. I. A. S. No. 5639.

3. As used herein—

(a) "Island" means a naturally-formed area of land surrounded by water, which is above the level of mean high water;

(b) "Low-tide elevation" means a naturally-formed area of land surrounded by water at mean lower low water, which is above the level of mean lower low water but not above the level of mean high water;

(c) "Mean lower low water" means the average elevation of all the daily lower low tides occurring over a period of 18.6 years;

(d) "Mean high water" means the average elevation of all the high tides occurring over a period of 18.6 years;

(e) "Geographical mile" means a distance of 1852 meters (6076.10333 . . . U. S. Survey Feet or approximately 6076.11549 International Feet).

4. As used herein, "inland waters" means waters landward of the baseline of the territorial sea, which are now recognized as internal waters of the United States under the Convention on the Territorial Sea and the Contiguous Zone. The inland waters referred to in paragraph 2 (b) hereof include—

(a) Any river or stream flowing directly into the sea, landward of a straight line across its mouth;

(b) Any port, landward of its outermost permanent harbor works and a straight line across its entrance;

(c) Any "historic bay," as that term is used in paragraph 6 of Article 7 of the Convention, defined essentially as a bay over which the United States has traditionally asserted and maintained dominion with the acquiescence of foreign nations;

(d) Any other bay (defined as a well-marked coastal indentation having such penetration, in proportion to the width of its entrance, as to contain landlocked waters, and having an area, including islands within the bay, at least as great as the area of a semicircle whose diameter equals the length of the closing line across the entrance of the bay, or the sum of such closing lines if the bay has more than one entrance), landward of a straight line across its entrance or, if the entrance is more than 24 geographical miles wide, landward of a straight line not over 24 geographical miles long, drawn within the bay so as to enclose the greatest possible amount of water. An estuary of a river is treated in the same way as a bay.

5. In drawing a closing line across the entrance of any body of inland water having pronounced headlands, the line shall be drawn between the points where the plane of mean lower low water meets the outermost extension of the headlands. Where there is no pronounced headland, the line shall be drawn to the point where the line of mean lower low water on the shore is intersected by the bisector of the angle formed where a line projecting the general trend of the line of mean lower low water along the open coast meets a line projecting the general trend of the line of mean lower low water along the tributary waterway.

6. Roadsteads, waters between islands, and waters between islands and the mainland are not *per se* inland waters.

7. The inland waters of the Port of San Pedro are those enclosed by the breakwater and by straight lines across openings in the breakwater; but the limits of the port, east of the eastern end of the breakwater, are not determined by this decree.

8. The inland waters of Crescent City Harbor are those enclosed within the breakwaters and a straight line from the outer end of the west breakwater to the southern extremity of Whaler Island.

9. The inland waters of Monterey Bay are those enclosed by a straight line between Point Pinos and Point Santa Cruz.

10. The description of the inland waters of the Port of San Pedro, Crescent City Harbor, and Monterey Bay, as set forth in paragraphs 7, 8, and 9 hereof, does not imply that the three-mile limit is to be measured from the seaward limits of those inland waters in places where

the three-mile limit is placed farther seaward by the application of any other provision of this decree.

11. The following are not historic inland waters, and do not comprise inland waters except to the extent that they may be enclosed by lines as hereinabove described for the enclosure of inland waters other than historic bays:

(a) Waters between the Santa Barbara or Channel Islands, or between those islands and the mainland;

(b) Waters adjacent to the coast between Point Conception and Point Hueneme;

(c) Waters adjacent to the coast between Point Fermin and Point Lasuen (identified as the bluffs at the end of the Las Bolsas Ridge at Huntington Beach);

(d) Waters adjacent to the coast between Point Lasuen and the western headland of Newport Bay;

(e) Santa Monica Bay;

(f) Crescent City Bay;

(g) San Luis Obispo Bay.

12. With the exceptions provided by § 5 of the Submerged Lands Act, 67 Stat. 32, 43 U. S. C. § 1313 (1964 ed.), and subject to the powers reserved to the United States by § 3 (d) and § 6 of said Act, 67 Stat. 31, 32, 43 U. S. C. §§ 1311 (d) and 1314 (1964 ed.), the State of California is entitled, as against the United States, to the title to and ownership of the tidelands along its coast (defined as the shore of the mainland and of islands, between the line of mean high water and the line of mean lower low water) and the submerged lands, minerals, other natural resources and improvements underlying the inland waters and the waters of the Pacific Ocean within three geographical miles seaward from the coast line and bounded on the north and south by the northern and southern boundaries of the State of California, including the right and power to manage, administer, lease, develop and use the said lands and natural resources

all in accordance with applicable State law. The United States is not entitled, as against the State of California, to any right, title or interest in or to said lands, improvements and natural resources except as provided by § 5 of the Submerged Lands Act.

13. The parties shall submit to the Court for its approval any stipulation or stipulations that they may enter into, identifying with greater particularity all or any part of the boundary line, as defined by this decree, between the submerged lands of the United States and the submerged lands of the State of California, or identifying any of the areas reserved to the United States by § 5 of the Submerged Lands Act. As to any portion of such boundary line or of any areas claimed to have been reserved under § 5 of the Submerged Lands Act as to which the parties may be unable to agree, either party may apply to the Court at any time for entry of a further supplemental decree.

14. The Court retains jurisdiction to entertain such further proceedings, enter such orders, and issue such writs as may from time to time be deemed necessary or advisable to give proper force and effect to this decree or to effectuate the rights of the parties in the premises.

THE CHIEF JUSTICE, MR. JUSTICE CLARK, and MR. JUSTICE FORTAS took no part in the formulation of this decree.

UNITED STATES ET AL. *v.* WILSON & CO., INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 56. Decided January 31, 1966.

335 F. 2d 788, remanded.

Solicitor General Marshall for the United States et al.

Howard J. Trienens for respondents American Telephone & Telegraph Co. et al.

PER CURIAM.

The joint motion of counsel to remand is granted and the case is remanded to the United States Court of Appeals for the Seventh Circuit in order to permit the entry of a decree of restitution in accordance with the agreement of the parties.

BECK *v.* McLEOD, ATTORNEY GENERAL OF SOUTH CAROLINA.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA.

No. 770. Decided January 31, 1966.

240 F. Supp. 708, affirmed.

Samuel C. Craven for appellant.

Daniel R. McLeod, Attorney General of South Carolina, and *Everett N. Brandon,* Assistant Attorney General, for appellee.

PER CURIAM.

The judgment is affirmed.

RAINSBERGER *v.* NEVADA.

APPEAL FROM THE SUPREME COURT OF NEVADA.

No. 368, Misc. Decided January 31, 1966.

81 Nev. 92, 399 P. 2d 129, appeal dismissed.

Samuel S. Lionel for appellant.

Paul C. Parraguirre for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

NAWROCKI *v.* MICHIGAN.

APPEAL FROM THE SUPREME COURT OF MICHIGAN.

No. 966, Misc. Decided January 31, 1966.

376 Mich. 252, 136 N. W. 2d 922, appeal dismissed and certiorari denied.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

PLATT, CHIEF JUDGE, U. S. DISTRICT COURT *v.* MINNESOTA MINING & MANUFACTURING CO.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 274. Decided January 31, 1966.

Certiorari granted; 345 F. 2d 681, vacated and remanded.

Solicitor General Marshall, former *Solicitor General Cox, Acting Assistant Attorney General Wright* and *Lionel Kestenbaum* for petitioner.

John T. Chadwell, Glenn W. McGee, Allan J. Reniche, William H. Abbott and *John L. Connolly* for respondent.

PER CURIAM.

Upon consideration of the suggestion of mootness filed by the Solicitor General and upon an examination of the entire record, the petition for a writ of certiorari is granted, the judgment of the United States Court of Appeals for the Seventh Circuit is vacated and the case is remanded to that court with instructions to dismiss the mandamus proceeding as moot.

Reporter's Note.

The next page is purposely numbered 801. The numbers between 456 and 801 were intentionally omitted, in order to make it possible to publish the orders in the current advance sheets or preliminary prints of the United States Reports with *permanent* page numbers, thus making the official citations immediately available.

PRATT, CHIEF JUDGE, U.S. DISTRICT COURT *v.* MINNESOTA MINING & MANUFACTURING CO.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. [illegible]. Decided [illegible], 1966.

Certiorari granted; [illegible] F. 2d [illegible], [illegible] and remanded.

Solicitor General Marshall, [illegible], *Acting Assistant Attorney General Wright* and *Lionel Kestenbaum* for petitioner.

John T. Chadwell, [illegible] for respondent.

Upon consideration of the [illegible] by the Solicitor General, and upon an examination of the entire record, the petition for a writ of certiorari is granted, the judgment of the United States Court of Appeals for the Seventh Circuit is reversed and the case is remanded to that court with instructions to dismiss the mandamus proceedings as moot.

ORDERS FROM END OF OCTOBER TERM, 1964, THROUGH JANUARY 31, 1966.

Cases Dismissed in Vacation.

No. 231, Misc. **Meunier** *v.* **United States.** C. A. 5th Cir. Petition for writ of certiorari dismissed July 8, 1965, pursuant to Rule 60 of the Rules of this Court.

No. 93. **Crane Co.** *v.* **Evans-Hailey Co., Inc.** Appeal from D. C. M. D. Tenn. dismissed July 21, 1965, pursuant to Rule 60 of the Rules of this Court. *Cecil Sims* for appellant.

No. 20, Original. **Kansas** *v.* **Colorado.** Motion for leave to file bill of complaint dismissed August 2, 1965, pursuant to Rule 60 of the Rules of this Court. *Robert C. Londerholm,* Attorney General of Kansas, and *Charles N. Henson, Jr.,* Assistant Attorney General, for plaintiff. *Duke W. Dunbar,* Attorney General of Colorado, *James D. Geissinger* and *Raphael J. Moses,* Assistant Attorneys General, and *Donald H. Hamburg,* Special Assistant Attorney General, for defendant.

No. 54. **Milgram Food Stores, Inc.** *v.* **Ketchum, Supervisor, Missouri Department of Liquor Control.** Sup. Ct. Mo. Petition for writ of certiorari dismissed August 2, 1965, pursuant to Rule 60 of the Rules of this Court. *F. Philip Kirwan* for petitioner. Reported below: 384 S. W. 2d 510.

No. 326. **M & J Diesel Locomotive Filter Corp. et al.** *v.* **Briggs et al.** C. A. 7th Cir. Petition for writ of certiorari dismissed August 19, 1965, pursuant to Rule 60 of the Rules of this Court. *Edwin A. Rothschild* for petitioners. Reported below: 342 F. 2d 573.

PLATT, CHIEF JUDGE, U. S. DISTRICT COURT *v.* MINNESOTA MINING & MANUFACTURING CO.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 873. Decided January 31, 1966.

Certiorari granted; 348 F. 2d 361, vacated and remanded.

Solicitor General Marshall, Former Solicitor General Cox, Acting Assistant Attorney General Wright and *Lionel Kestenbaum* for petitioner.

John T. Chadwell, George H. Mueller, Allan J. [illegible] [illegible] for respondent.

PER CURIAM.

Upon consideration of the suggestion of mootness filed by the Solicitor General and upon an examination of the entire record, the petition for a writ of certiorari is granted, the judgment of the United States Court of Appeals for the Seventh Circuit is vacated and the case is remanded to that court with instructions to dismiss the mandamus proceeding as moot.

ORDERS FROM END OF OCTOBER TERM, 1964, THROUGH JANUARY 31, 1966.

CASES DISMISSED IN VACATION.

No. 231, Misc. MEUNIER *v.* UNITED STATES. C. A. 5th Cir. Petition for writ of certiorari dismissed July 8, 1965, pursuant to Rule 60 of the Rules of this Court.

No. 93. CRANE CO. *v.* EVANS-HAILEY CO., INC. Appeal from D. C. M. D. Tenn. dismissed July 21, 1965, pursuant to Rule 60 of the Rules of this Court. *Cecil Sims* for appellant.

No. 20, Original. KANSAS *v.* COLORADO. Motion for leave to file bill of complaint dismissed August 2, 1965, pursuant to Rule 60 of the Rules of this Court. *Robert C. Londerholm,* Attorney General of Kansas, and *Charles N. Henson, Jr.,* Assistant Attorney General, for plaintiff. *Duke W. Dunbar,* Attorney General of Colorado, *James D. Geissinger* and *Raphael J. Moses,* Assistant Attorneys General, and *Donald H. Hamburg,* Special Assistant Attorney General, for defendant.

No. 54. MILGRAM FOOD STORES, INC. *v.* KETCHUM, SUPERVISOR, MISSOURI DEPARTMENT OF LIQUOR CONTROL. Sup. Ct. Mo. Petition for writ of certiorari dismissed August 2, 1965, pursuant to Rule 60 of the Rules of this Court. *F. Philip Kirwan* for petitioner. Reported below: 384 S. W. 2d 510.

No. 326. M & J DIESEL LOCOMOTIVE FILTER CORP. ET AL. *v.* BRIGGS ET AL. C. A. 7th Cir. Petition for writ of certiorari dismissed August 19, 1965, pursuant to Rule 60 of the Rules of this Court. *Edwin A. Rothschild* for petitioners. Reported below: 342 F. 2d 573.

No. 171, Misc. STANLEY *v.* NEW YORK. Ct. App. N. Y. Petition for writ of certiorari dismissed August 31, 1965, pursuant to Rule 60 of the Rules of this Court.

No. 236. CONSOLIDATED FREIGHTWAYS CORP. OF DELAWARE *v.* UNITED STATES ET AL. Appeal from D. C. N. D. Cal. dismissed September 1, 1965, pursuant to Rule 60 of the Rules of this Court. *William H. Dempsey, Jr.,* and *Eugene T. Liipfert* for appellant. *Solicitor General Cox, Assistant Attorney General Turner, Lionel Kestenbaum, I. Daniel Stewart, Jr., Robert W. Ginnane* and *Robert S. Burk* for the United States. *Earle V. White* for appellee Everts' Commercial Transport, Inc. Reported below: 237 F. Supp. 391.

No. 475, Misc. CRAIG *v.* NEBRASKA. C. A. 8th Cir. Petition for writ of certiorari dismissed September 21, 1965, pursuant to Rule 60 of the Rules of this Court.

OCTOBER 11, 1965.

Miscellaneous Orders.

No. 38. ROSENBLATT *v.* BAER. Sup. Ct. N. H. (Certiorari granted, 380 U. S. 941.) Motion of American Civil Liberties Union for leave to file brief, as *amicus curiae*, granted. *Osmond K. Fraenkel, Edward J. Ennis* and *Melvin L. Wulf* for American Civil Liberties Union, as *amicus curiae,* urging reversal. *Stanley M. Brown* for respondent, in opposition to the motion.

No. 29. UNITED STATES *v.* EWELL ET AL. Appeal from D. C. S. D. Ind. (Probable jurisdiction noted, 381 U. S. 909.) Motion for appointment of counsel granted. It is ordered that *David B. Lockton, Esquire,* of Indianapolis, Indiana, be, and he is hereby, appointed to serve as counsel on behalf of Clarence Ewell, an appellee in this case.

No. 18, Original. ILLINOIS *v.* MISSOURI. Motion to make complaint more definite and certain granted. *Norman H. Anderson,* Attorney General of Missouri, *Harold L. McFadden,* Assistant Attorney General, and *Stanley M. Rosenblum* on the motion. [For earlier orders herein, see 379 U. S. 952; 380 U. S. 901, 969.]

No. 12. WESTERN PACIFIC RAILROAD CO. ET AL. *v.* UNITED STATES ET AL. D. C. N. D. Cal. (Probable jurisdiction noted, 379 U. S. 956.) Joint motion to remove case from summary calendar and for permission for two attorneys to present oral argument for each side granted. *E. Barrett Prettyman, Jr.,* for appellants; *Acting Solicitor General Spritzer* and *Robert W. Ginnane* for the United States et al., and *Frank S. Farrell* for Northern Pacific Railway Co. et al., appellees, on the motion.

No. 42. GINZBURG ET AL. *v.* UNITED STATES. C. A. 3d Cir. (Certiorari granted, 380 U. S. 961.) Motion of petitioners to remove case from summary calendar denied. *Sidney Dickstein* on the motion.

No. 88. IN RE MACKAY. Sup. Ct. Alaska. Motion to defer consideration of the petition for writ of certiorari granted. *Joseph A. Ball* and *Edgar Paul Boyko* on the motion.

No. 104. KENT *v.* UNITED STATES. C. A. D. C. Cir. (Certiorari granted, 381 U. S. 902.) Motion to remove this case from summary calendar granted. *Myron G. Ehrlich* on the motion.

No. 346. CANADA PACKERS, LTD. *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY CO. ET AL. C. A. 7th Cir. The Solicitor General is invited to file a brief expressing the views of the United States.

No. 355. LITTELL *v.* NAKAI. C. A. 9th Cir. The Solicitor General is invited to file a brief expressing the views of the United States.

No. 308, Misc. PLUNKETT *v.* LANE, WARDEN. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for writ of certiorari, certiorari is denied.

No. 177, Misc. LANGSTON *v.* KEARNEY, WARDEN;
No. 179, Misc. HENDERSON *v.* MAXWELL, WARDEN;
No. 195, Misc. BROWN *v.* FLORIDA;
No. 204, Misc. HUFFMAN *v.* MARONEY, CORRECTIONAL SUPERINTENDENT;
No. 245, Misc. MARTINEZ *v.* WILSON, WARDEN, ET AL.;
No. 306, Misc. CRUZ *v.* BETO, CORRECTIONS DIRECTOR;
No. 309, Misc. SMITH *v.* CALIFORNIA ET AL.;
No. 329, Misc. JAMISON *v.* KEARNEY, WARDEN;
No. 330, Misc. PARKER *v.* MAXWELL, WARDEN;
No. 349, Misc. HAYES *v.* PATE, WARDEN;
No. 391, Misc. BEY *v.* ANDERSON, JAIL SUPERINTENDENT;
No. 393, Misc. MITCHELL *v.* FLORIDA;
No. 440, Misc. SCHACK *v.* FLORIDA ET AL.;
No. 447, Misc. ARCHIE *v.* NEW MEXICO;
No. 450, Misc. DANGLER *v.* WAINWRIGHT, CORRECTIONS DIRECTOR, ET AL.; and
No. 532, Misc. CLINE *v.* DUNBAR. Motions for leave to file petitions for writs of habeas corpus denied.

No. 22, Misc. DAVIS *v.* BETO, CORRECTIONS DIRECTOR. Motion for leave to file petition for writ of habeas corpus denied. Petitioner *pro se.* *Waggoner Carr,* Attorney General of Texas, *Hawthorne Phillips,* First Assistant Attorney General, *Stanton Stone,* Executive Assistant Attorney General, and *Howard M. Fender,* Assistant Attorney General, for respondent.

No. 260, Misc. DeSimone *v.* Chief Justice of Illinois Supreme Court et al. Motion for leave to file petition for writ of mandamus denied.

No. 58, Misc. Lyons *v.* Klatte, State Hospital Superintendent. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for writ of certiorari, certiorari is denied. Petitioner *pro se.* *Thomas C. Lynch,* Attorney General of California, and *Robert R. Granucci* and *Jay S. Linderman,* Deputy Attorneys General, for respondent.

No. 501, Misc. Acuff *v.* Cook Machinery Co., Inc. Motion for leave to file petition for writ of injunction and for other relief denied.

No. 18, Misc. Caldwell *v.* Underwood, U. S. District Judge, et al. Motion for leave to file petition for writ of mandamus denied.

No. 19, Misc. Miller *v.* Biggs, Chief Judge, U. S. Court of Appeals. Motion for leave to file petition for writ of mandamus denied. *David H. Kubert* for petitioner. *Philip W. Amram* and *Gilbert Hahn, Jr.,* for respondent. *Emil F. Goldhaber,* Special Assistant Attorney General of Pennsylvania, filed a memorandum for the Commonwealth of Pennsylvania.

No. 232, Misc. Doster *v.* Coash, Circuit Judge, et al. Motion for leave to file petition for writ of mandamus denied.

No. 251, Misc. Ginsberg, Trustee *v.* Fulton, U. S. District Judge. Motion for leave to file petition for writ of mandamus denied. *Daniel L. Ginsberg* for petitioner. *Solicitor General Cox, Acting Assistant Attorney General Jones, Harold C. Wilkenfeld* and *Crombie J. D. Garrett* for respondent.

No. 117, Misc. PARSON *v.* ANDERSON, JAIL SUPERINTENDENT. Motion for leave to file petition for writ of habeas corpus denied. Petitioner *pro se.* *Solicitor General Cox* for respondent.

No. 91, Misc. WALLACH *v.* CHANDLER, CHIEF JUDGE, U. S. DISTRICT COURT, ET AL. Motion for leave to file petition for writ of mandamus and/or prohibition denied.

Probable Jurisdiction Noted.

No. 28, Misc. BUTTS *v.* HARRISON, GOVERNOR OF VIRGINIA, ET AL. Appeal from D. C. E. D. Va. Motion for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted and case transferred to appellate docket. The case is consolidated with No. 48 and a total of two hours is allotted for oral argument. *Robert L. Segar, Max Dean, Len W. Holt* and *J. A. Jordan, Jr.*, for appellant. *Robert Y. Button,* Attorney General of Virginia, and *Richard N. Harris,* Assistant Attorney General, for appellees. Reported below: 240 F. Supp. 270.

No. 303. UNITED STATES *v.* VON'S GROCERY CO. ET AL. Appeal from D. C. S. D. Cal. Probable jurisdiction noted. MR. JUSTICE FORTAS took no part in the consideration or decision of this case. *Solicitor General Cox, Acting Assistant Attorney General Wright, Robert B. Hummel, Elliott H. Moyer* and *James J. Coyle* for the United States. *William W. Alsup* and *Warren M. Christopher* for appellees. Reported below: 233 F. Supp. 976.

No. 238. UNITED STATES *v.* SEALY, INC. Appeal from D. C. N. D. Ill. Probable jurisdiction noted. *Solicitor General Cox, Assistant Attorney General Orrick, Robert B. Hummel* and *Gerald Kadish* for the United States. *John T. Chadwell, Richard W. McLaren* and *Richard S. Rhodes* for appellee.

No. 318. BURNS, GOVERNOR OF HAWAII *v.* RICHARDSON ET AL.;

No. 323. CRAVALHO ET AL. *v.* RICHARDSON ET AL.; and

No. 409. ABE ET AL. *v.* RICHARDSON ET AL. Appeals from D. C. Hawaii. Motion of Harold S. Roberts for leave to file brief, as *amicus curiae,* in Nos. 318 and 323, granted. Probable jurisdiction noted. The cases are consolidated and a total of three hours is allotted for oral argument. MR. JUSTICE FORTAS took no part in the consideration or decision of these cases. *Bert T. Kobayashi,* Attorney General of Hawaii, *Bertram T. Kanbara* and *Nobuki Kamida,* Deputy Attorneys General, *Thurman Arnold, Abe Fortas* and *Dennis G. Lyons* for appellant in No. 318 and for appellee Burns in Nos. 323 and 409. *James T. Funaki* and *Eugene W. I. Lau* for appellants in No. 323. *Kazuhisa Abe* for appellants in No. 409. *Richard K. Sharpless* on motion of Harold S. Roberts for leave to file brief, as *amicus curiae,* in Nos. 318 and 323. Reported below: 238 F. Supp. 468; 240 F. Supp. 724.

No. 291. UNITED STATES *v.* STANDARD OIL CO. Appeal from D. C. M. D. Fla. Probable jurisdiction noted. *Solicitor General Cox, Assistant Attorney General Vinson, Ralph S. Spritzer* and *Beatrice Rosenberg* for the United States. *Earl B. Hadlow* and *John H. Wilbur* for appellee.

Certiorari Granted.

No. 106. FEDERAL TRADE COMMISSION *v.* BORDEN CO. C. A. 5th Cir. Certiorari granted. *Solicitor General Cox, Assistant Attorney General Orrick, Robert B. Hummel, Gerald Kadish, James McI. Henderson* and *Charles C. Moore, Jr.,* for petitioner. *John E. F. Wood, Kent V. Lukingbeal, Robert C. Johnston, Philip S. Campbell* and *C. Brien Dillon* for respondent. Reported below: 339 F. 2d 133.

No. 118. Federal Trade Commission *v.* Brown Shoe Co., Inc. C. A. 8th Cir. Certiorari granted. *Solicitor General Cox, Assistant Attorney General Orrick, Robert B. Hummel, Donald L. Hardison, James McI. Henderson, Thomas F. Howder* and *Gerald J. Thain* for petitioner. *Robert H. McRoberts* for respondent. Reported below: 339 F. 2d 45.

No. 147. Georgia *v.* Rachel et al. C. A. 5th Cir. Certiorari granted. *Eugene Cook,* Attorney General of Georgia, *Albert Sidney Johnson,* Deputy Assistant Attorney General, *Lewis R. Slaton, Jr.,* Solicitor General, and *J. Robert Sparks,* Assistant Solicitor General, for petitioner. Reported below: 342 F. 2d 336.

No. 280. Accardi et al. *v.* Pennsylvania Railroad Co. C. A. 2d Cir. Certiorari granted. *Solicitor General Cox, Assistant Attorney General Douglas, Ralph S. Spritzer, Alan S. Rosenthal* and *Richard S. Salzman* for petitioners. *Edward F. Butler* and *R. L. Duff* for respondent. Reported below: 341 F. 2d 72.

No. 387. International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW), AFL-CIO *v.* Hoosier Cardinal Corp. C. A. 7th Cir. Certiorari granted. *Joseph L. Rauh, Jr., John Silard, Stephen I. Schlossberg* and *Harriett R. Taylor* for petitioner. *John E. Early* for respondent. Reported below: 346 F. 2d 242.

No. 351. Commissioner of Internal Revenue *v.* Tellier et ux. C. A. 2d Cir. Certiorari granted. *Solicitor General Cox, Acting Assistant Attorney General Jones, Harry Baum* and *Robert A. Bernstein* for petitioner. *Michael Kaminsky* for respondents. Reported below: 342 F. 2d 690.

No. 243. UNITED MINE WORKERS OF AMERICA *v.* GIBBS. C. A. 6th Cir. Certiorari granted. *Willard P. Owens, E. H. Rayson* and *R. R. Kramer* for petitioner. *Harold E. Brown* for respondent. Reported below: 343 F. 2d 609.

No. 161. SUROWITZ *v.* HILTON HOTELS CORP. ET AL. C. A. 7th Cir. Certiorari granted. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. *Sidney M. Davis, Richard F. Watt* and *Walter J. Rockler* for petitioner. *Leslie Hodson, Don H. Reuben* and *Lawrence Gunnels* for Hilton Hotels Corp., and *Albert E. Jenner, Jr.,* and *Samuel W. Block* for Hilton et al., respondents. Reported below: 342 F. 2d 596.

No. 210. STEVENS *v.* MARKS, NEW YORK SUPREME COURT JUSTICE. App. Div., Sup. Ct. N. Y., 1st Jud. Dept.; and

No. 290. STEVENS *v.* MCCLOSKEY, SHERIFF. C. A. 2d Cir. Certiorari granted limited to Question 1 presented by the petitions which reads as follows:

"1. Is Article 1, Section 6 of the New York State Constitution and Section 1123 of the New York City Charter repugnant to the United States Constitution in that any public officer who refuses to sign a waiver of immunity and claims a privilege against self-incrimination suffers a penalty of loss of his public position and is barred from public employment for five years under the New York State Constitution and forever under the New York City Charter?"

The cases are consolidated and a total of two hours is allotted for oral argument. *Gerard E. Maloney* for petitioner. *Frank S. Hogan* and *H. Richard Uviller* for respondents. Reported below: No. 210, 22 App. Div. 2d 683, 253 N. Y. S. 2d 401; No. 290, 345 F. 2d 305.

No. 127. UNITED STATES *v.* O'MALLEY ET AL., EXECUTORS. C. A. 7th Cir. Certiorari granted. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Loring W. Post* for the United States. *Thomas P. Sullivan* for respondents. Reported below: 340 F. 2d 930.

No. 282. AMELL ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari granted. *Lee Pressman, David Scribner* and *Joan Stern Kiok* for petitioners. *Solicitor General Cox* for the United States.

No. 341. WALLIS *v.* PAN AMERICAN PETROLEUM CORP. ET AL. C. A. 5th Cir. Certiorari granted. The Solicitor General is invited to file a brief expressing the views of the United States. *Murray F. Cleveland* for petitioner. *Morris Wright* and *Percy Sandel* for Pan American Petroleum Corp., and *E. L. Brunini* for McKenna, respondents. Reported below: 344 F. 2d 432.

No. 168, Misc. ELFBRANDT *v.* RUSSELL ET AL. Sup. Ct. Ariz. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari granted. The case is transferred to the appellate docket. *W. Edward Morgan* for petitioner. *Darrell F. Smith,* Attorney General of Arizona, *Philip M. Haggerty,* Assistant Attorney General, and *Norman E. Green* for respondents. Reported below: 97 Ariz. 140, 397 P. 2d 944.

No. 99, Misc. BROOKHART *v.* OHIO. Sup. Ct. Ohio. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari granted. The case is transferred to the appellate docket. Petitioner *pro se.* *William B. Saxbe,* Attorney General of Ohio, and *Leo J. Conway,* Assistant Attorney General, for respondent. Reported below: 2 Ohio St. 2d 36, 205 N. E. 2d 911.

Certiorari Denied. (See also No. 170, *ante,* p. 13; No. 184, *ante,* p. 14; No. 358, *ante,* p. 21; No. 12, Misc., *ante,* p. 20; No. 81, Misc., *ante,* p. 22; No. 137, Misc., *ante,* p. 21; No. 202, Misc., *ante,* p. 23; No. 248, Misc., *ante,* p. 24; No. 281, Misc., *ante,* p. 19; No. 342, Misc., *ante,* p. 17; and Misc. Nos. 58 and 308, *supra.*)

No. 64. EASTERN AIR LINES, INC. *v.* FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION ET AL. C. A. 5th Cir. Certiorari denied. *E. Smythe Gambrell* and *W. Glen Harlan* for petitioner. *I. J. Gromfine* and *Herman Sternstein* for respondents. *Acting Solicitor General Spritzer, Assistant Attorney General Douglas, Morton Hollander, Sherman L. Cohn* and *John C. Eldridge* for the United States, as *amicus curiae,* in support of the petition. [For earlier order herein, see 381 U. S. 908.] Reported below: 340 F. 2d 104.

No. 66. LIST *v.* LERNER, DBA LERNER & CO., ET AL. C. A. 2d Cir. Certiorari denied. *Arthur F. Driscoll, Edward C. Raftery, Milton M. Rosenbloom* and *Edmund C. Grainger, Jr.,* for petitioner. *Leonard I. Schreiber* for Lerner, and *William E. Friedman* for H. Hentz & Co. et al., respondents. *Acting Solicitor General Spritzer, Philip A. Loomis, Jr., David Ferber* and *Michael Joseph* for the United States, as *amicus curiae.* [For earlier order herein, see 381 U. S. 908.] Reported below: 340 F. 2d 457.

No. 68. SIGAL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Michael von Moschzisker* for petitioner. *Solicitor General Cox, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 341 F. 2d 837.

No. 78. Atlantic & Gulf Stevedores, Inc. *v.* Ellerman Lines, Ltd. C. A. 3d Cir. Certiorari denied. *Francis E. Marshall* for petitioner. *Mark D. Alspach* for respondent. Reported below: 339 F. 2d 673.

No. 80. Ring *v.* New Jersey. Super. Ct. N. J. Certiorari denied. *Carl E. Ring* for petitioner. *Guy W. Calissi* for respondent. Reported below: 85 N. J. Super. 341, 204 A. 2d 716.

No. 83. Crombie *v.* Crombie. Dist. Ct. App. Cal., 1st App. Dist. Certiorari denied. *Paul E. Sloane* for petitioner. *Walter E. Hettman* and *Julian D. Brewer* for respondent.

No. 91. Wiper, Executrix *v.* Great Lakes Engineering Works. C. A. 6th Cir. Certiorari denied. *Harvey Goldstein* and *Donald C. Miller* for petitioner. *Leroy G. Vandeveer* for respondent. Reported below: 340 F. 2d 727.

No. 95. Berata et al. *v.* United States. C. A. 2d Cir. Certiorari denied. *Albert J. Krieger* for petitioners. *Solicitor General Cox, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 343 F. 2d 469.

No. 96. Hall *v.* United States. C. A. 4th Cir. Certiorari denied. *Edmund D. Campbell* for petitioner. *Solicitor General Cox, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 342 F. 2d 849.

No. 98. Walker *v.* Foster et al. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *John Joseph Leahy* for respondents.

No. 97. COMMISSIONER OF INTERNAL REVENUE *v.* FENDER SALES, INC. C. A. 9th Cir. Certiorari denied. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Melva M. Graney* and *David I. Granger* for petitioner. Reported below: 338 F. 2d 924.

No. 99. HENRIQUES *v.* CALIFORNIA. Dist. Ct. App. Cal., 2d App. Dist. Certiorari denied. *Bert B. Rand* for petitioner.

No. 101. SHEPHARD, GUARDIAN *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. *William R. Bagby* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Melva M. Graney* for respondent. Reported below: 340 F. 2d 27.

No. 102. ECONOMY FORMS CORP. *v.* TRINITY UNIVERSAL INSURANCE CO. ET AL. C. A. 8th Cir. Certiorari denied. *Harlan J. Thoma* and *Herbert L. Meschke* for petitioner. *Rodger John Walsh* for respondents. Reported below: 340 F. 2d 613.

No. 103. UNITED DRAPERIES, INC. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. *Harold R. Burnstein, John W. Hughes* and *George Brode* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Meyer Rothwacks* and *Fred E. Youngman* for respondent. Reported below: 340 F. 2d 936.

No. 107. WALTHAM WATCH CO. ET AL. *v.* FEDERAL TRADE COMMISSION. C. A. D. C. Cir. Certiorari denied. *B. Paul Noble* for petitioners. *Solicitor General Cox, Assistant Attorney General Orrick, Lionel Kestenbaum, James McI. Henderson, Charles C. Moore, Jr.,* and *Lester A. Klaus* for respondent.

No. 105. WILLIAMS *v.* HOWARD JOHNSON'S, INC., OF WASHINGTON. C. A. 4th Cir. Certiorari denied. Petitioner *pro se.* *James H. Simmonds* and *Richard A. Mehler* for respondent. Reported below: 342 F. 2d 727.

No. 108. STEPHENSON *v.* UNITED STATES. C. C. P. A. Certiorari denied. Petitioner *pro se.* *Solicitor General Cox* for the United States. Reported below: 52 C. C. P. A. (Cust.) 17.

No. 115. DUNSCOMBE *v.* SAYLE, EXECUTRIX. C. A. 5th Cir. Certiorari denied. *John Wattawa* for petitioner. *C. Robert Burns* for respondent.

No. 116. HELMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Joe B. Goodwin* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Joseph M. Howard* for the United States. Reported below: 340 F. 2d 15.

No. 110. VAN ZANDT ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. *R. B. Cannon* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Gilbert E. Andrews* and *Frederick E. Youngman* for respondent. Reported below: 341 F. 2d 440.

No. 113. U. S. INDUSTRIES, INC., ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. *Frank D. MacDowell, Gordon Johnson, Jesse R. O'Malley* and *Julian O. Von Kalinowski* for petitioners. *Solicitor General Cox, Assistant Attorney General Orrick, Lionel Kestenbaum* and *Elliott Moyer* for the United States District Court, *Joseph L. Alioto* for No-Joint Concrete Pipe Co. et al., and *John Joseph Hall* for Perovich et al., respondents. Reported below: 345 F. 2d 18.

No. 109. Albritton Engineering Corp. *v.* National Labor Relations Board. C. A. 5th Cir. Certiorari denied. *L. G. Clinton, Jr.,* for petitioner. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli, Norton J. Come* and *Melvin Pollack* for respondent. Reported below: 340 F. 2d 281.

No. 117. Vogel et al. *v.* Corporation Commission of Oklahoma et al. Sup. Ct. Okla. Certiorari denied. *Carl L. Shipley* for petitioners. *Ferrill H. Rogers* for Corporation Commission of Oklahoma, respondent. Reported below: 399 P. 2d 474.

No. 120. Cheyenne River Sioux Tribe of Indians *v.* United States et al. C. A. 8th Cir. Certiorari denied. *William Howard Payne* for petitioner. *Solicitor General Cox* for the United States. Reported below: 338 F. 2d 906.

No. 126. Lippi *v.* United States. C. A. 3d Cir. Certiorari denied. *Edward L. Carey* and *Walter E. Gillcrist* for petitioner. *Solicitor General Cox, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 342 F. 2d 218.

No. 129. Crance et al. *v.* United States. C. A. 8th Cir. Certiorari denied. *Edgar Shook* for petitioners. *Solicitor General Cox, Assistant Attorney General Weisl, Roger P. Marquis* and *Richard N. Countiss* for the United States. Reported below: 341 F. 2d 161.

No. 130. Rucker, Guardian *v.* Fifth Avenue Coach Lines, Inc., et al. Ct. App. N. Y. Certiorari denied. *Jacob D. Fuchsberg, Irving Malchman* and *Leo Pfeffer* for petitioner. *Stuart Riedel* for respondents. Reported below: 15 N. Y. 2d 516, 202 N. E. 2d 548.

No. 133. HITAI *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 2d Cir. Certiorari denied. *Francis L. Giordano* for petitioner. *Solicitor General Cox, Assistant Attorney General Vinson* and *Philip R. Monahan* for respondent. Reported below: 343 F. 2d 466.

No. 134. DREXEL & CO. ET AL. *v.* HALL ET AL. C. A. 2d Cir. Certiorari denied. *Ralph M. Carson* for petitioners. *Wm. Francis Corson* for respondents. Reported below: 340 F. 2d 731.

No. 136. PAVGOUZAS *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 3d Cir. Certiorari denied. *Jacob J. Kilimnik* and *Gregory G. Lagakos* for petitioner. *Solicitor General Cox, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for respondent. Reported below: 341 F. 2d 920.

No. 138. EXCHANGE NATIONAL BANK OF OLEAN *v.* INSURANCE CO. OF NORTH AMERICA. C. A. 2d Cir. Certiorari denied. *Robert M. Diggs* for petitioner. *Richard E. Moot* for respondent. Reported below: 341 F. 2d 673.

No. 146. MILK DRIVERS & DAIRY EMPLOYEES LOCAL UNION NO. 584, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied. *Samuel J. Cohen* for petitioner. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 341 F. 2d 29.

No. 142. FLYING TIGER LINE, INC. *v.* MERTENS, ADMINISTRATOR, ET AL. C. A. 2d Cir. Certiorari denied. *Austin P. Magner* and *George N. Tompkins, Jr.*, for petitioner. *Clarence Fried* for respondents. Reported below: 341 F. 2d 851.

No. 139. TELLIER ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Michael Kaminsky* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Harry Baum* and *Robert A. Bernstein* for respondent. Reported below: 342 F. 2d 690.

No. 148. TRIMBLE *v.* TEXAS STATE BOARD OF REGISTRATION FOR PROFESSIONAL ENGINEERS. Ct. Civ. App. Tex., 8th Sup. Jud. Dist. Certiorari denied. *John R. Lee* for petitioner. *Waggoner Carr,* Attorney General of Texas, and *Hawthorne Phillips, T. B. Wright, J. C. Davis* and *Pat Bailey,* Assistant Attorneys General, for respondent. Reported below: 388 S. W. 2d 331.

No. 145. MILLER *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Petitioner *pro se. Frank S. Hogan* and *H. Richard Uviller* for respondent.

No. 157. MARCHESE ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. *Burton Marks, Russell E. Parsons* and *Sol C. Berenholtz* for petitioners. *Solicitor General Cox, Assistant Attorney General Vinson* and *Philip R. Monahan* for the United States et al. Reported below: 341 F. 2d 782.

No. 162. JERROLD ELECTRONICS CORP. ET AL. *v.* WESCOAST BROADCASTING CO., INC. C. A. 9th Cir. Certiorari denied. *Israel Packel* for petitioners. Reported below: 341 F. 2d 653.

No. 164. POTTER ET AL., DBA POTTER'S CAMERA STORE *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Joseph Goldberg* for petitioners. *Solicitor General Cox, Assistant Attorney General Douglas, Morton Hollander* and *David L. Rose* for the United States. Reported below: 167 Ct. Cl. 28.

No. 152. DEMERS *v.* BROWN ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 343 F. 2d 427.

No. 153. BANKS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Joseph I. Stone* for petitioner. *Solicitor General Cox, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 165. MCMASTER *v.* UNITED STATES; and
No. 166. WOLFF *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Morris A. Shenker* and *Murry L. Randall* for petitioner in No. 165. *George Gregory Mantho* for petitioner in No. 166. *Solicitor General Cox, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 343 F. 2d 176.

No. 167. GARDINER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Robert R. Slaughter* for petitioner. *Solicitor General Cox, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 341 F. 2d 896.

No. 168. MT. MANSFIELD TELEVISION, INC. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Charles D. Post* for petitioner. *Solicitor General Cox* and *Acting Assistant Attorney General Roberts* for the United States. Reported below: 342 F. 2d 994.

No. 171. VILLAGE OF PORT CHESTER *v.* CATHERWOOD, INDUSTRIAL COMMISSIONER, ET AL. App Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. *Charles H. Tuttle* and *Godfrey P. Schmidt* for petitioner. *Louis J. Lefkowitz,* Attorney General of New York, and *Paxton Blair,* Solicitor General, for Catherwood, and *John R. Harold* for Bucci et al., respondents.

No. 169. Sun Ray Drug Co. *v.* Lieberman. Super. Ct. Pa. Certiorari denied. *Samuel Kagle* and *Oscar Brown* for petitioner. Reported below: 204 Pa. Super. 348, 204 A. 2d 783.

No. 172. Houghton *v.* Pike. C. A. D. C. Cir. Certiorari denied. *Carleton U. Edwards II* for petitioner. *Francis D. Thomas, Jr.,* for respondent.

No. 173. Pinciotti *v.* United States; and
No. 174. Gosser *v.* United States. C. A. 6th Cir. Certiorari denied. *Russell Morton Brown* for petitioner in No. 173. *Bennett Boskey* and *Merritt W. Green* for petitioner in No. 174. *Solicitor General Cox, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 339 F. 2d 102.

No. 175. Luster et al. *v.* United States. C. A. 6th Cir. Certiorari denied. Petitioners *pro se. Solicitor General Cox, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 342 F. 2d 763.

No. 176. Jenkins Bros. *v.* Local 5623, United Steelworkers of America, et al. C. A. 2d Cir. Certiorari denied. *Morgan P. Ames* and *Clifford R. Oviatt, Jr.,* for petitioner. *Bernard Kleiman, Elliot Bredhoff* and *Michael H. Gottesman* for respondents. Reported below: 341 F. 2d 987.

No. 177. Southwest Engineering Co. *v.* United States. C. A. 8th Cir. Certiorari denied. *Wallace N. Springer, Jr.,* for petitioner. *Solicitor General Cox, Assistant Attorney General Douglas, Alan S. Rosenthal* and *Jack H. Weiner* for the United States. Reported below: 341 F. 2d 998.

No. 178. Page et al. *v.* Pan American Petroleum Corp. et al. Ct. Civ. App. Tex., 13th Sup. Jud. Dist. Certiorari denied. *Willett Wilson* for petitioners. *Cecil N. Cook, Roy L. Merrill, Dwight H. Austin* and *Joyce Cox* for respondents. Reported below: 381 S. W. 2d 949.

No. 183. Associated Press *v.* Taft-Ingalls Corp., formerly Cincinnati Times-Star Co.; and

No. 185. Taft-Ingalls Corp. *v.* Associated Press. C. A. 6th Cir. Certiorari denied. *William P. Rogers, Timothy S. Hogan* and *H. Allen Lochner* for petitioner in No. 183 and for respondent in No. 185. *Robert T. Keeler* for petitioner in No. 185 and for respondent in No. 183. Reported below: 340 F. 2d 753.

No. 186. Price et al. *v.* Price. Super. Ct. Mass., Norfolk County. Certiorari denied. *John D. O'Reilly, Jr.,* for petitioners. *George Welch* for respondent. Reported below: See 348 Mass. 663, 204 N. E. 2d 902.

No. 187. Durovic *v.* Palmer et al. C. A. 7th Cir. Certiorari denied. *Julius L. Sherwin* for petitioner. *Solicitor General Cox, Assistant Attorney General Vinson, Beatrice Rosenberg* and *William W. Goodrich* for respondents. Reported below: 342 F. 2d 634.

No. 188. Scherer & Sons, Inc. *v.* International Ladies' Garment Workers' Union, Local No. 415, AFL–CIO, et al. C. A. 5th Cir. Certiorari denied. *Joseph A. Perkins* for petitioner. *Morris P. Glushien* for respondent International Ladies' Garment Workers' Union. Reported below: 341 F. 2d 298.

No. 194. Baker *v.* Simmons Co. C. A. 1st Cir. Certiorari denied. *Maurice Schwartz* for petitioner. *William E. Anderson* for respondent. Reported below: 342 F. 2d 991.

No. 189. Lichtenstein, aka Wells *v.* United States. C. A. 5th Cir. Certiorari denied. *Joseph Aronstein* for petitioner. *Solicitor General Cox, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 341 F. 2d 476.

No. 190. Coil *v.* United States. C. A. 8th Cir. Certiorari denied. *Richard J. Bruckner* for petitioner. *Solicitor General Cox, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Marshall Tamor Golding* for the United States. Reported below: 343 F. 2d 573.

No. 192. Sessoms *v.* Union Savings & Trust Co. C. A. 6th Cir. Certiorari denied. *Ralph Rudd* and *Charles R. Miller* for petitioner. *Ashley M. Van Duzer, Paul W. Walter* and *Arthur P. Steinmetz* for respondent. Reported below: 338 F. 2d 752.

No. 193. Dewey *v.* American National Bank et al. Ct. Civ. App. Tex., 7th Sup. Jud. Dist. Certiorari denied. Petitioner *pro se. L. A. White* for American National Bank, and *H. A. Berry* for Owen et al., respondents. Reported below: 382 S. W. 2d 524.

No. 195. DeLucia et al. *v.* New York. Ct. App. N. Y. Certiorari denied. *William Sonenshine* for petitioners. *Frank D. O'Connor* and *Benj. J. Jacobson* for respondent. Reported below: 15 N. Y. 2d 294, 206 N. E. 2d 324.

No. 197. G. L. Christian & Associates *v.* United States. Ct. Cl. Certiorari denied. *Gilbert A. Cuneo, Norman R. Crozier, Jr., Chester H. Johnson, O. D. Hite, William Hillyer, Wilson Johnston, Eldon H. Crowell* and *David V. Anthony* for petitioner. *Solicitor General Cox* for the United States. Reported below: 170 Ct. Cl. 902.

No. 196. WOFFORD ET AL. *v.* NORTH CAROLINA STATE HIGHWAY COMMISSION. Sup. Ct. N. C. Certiorari denied. *Roy L. Deal* for petitioners. Reported below: 263 N. C. 677, 140 S. E. 2d 376.

No. 198. STUFF *v.* E. C. PUBLICATIONS, INC., ET AL. C. A. 2d Cir. Certiorari denied. *Martin M. Pollak* and *Samuel J. Stoll* for petitioner. *Martin J. Scheiman* for respondents. Reported below: 342 F. 2d 143.

No. 199. DIAZ ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *G. Wray Gill* and *Paul H. Brinson* for petitioners. *Solicitor General Cox, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 341 F. 2d 912.

No. 200. BATES, DBA FRATELLI'S RESTAURANT *v.* BOARD OF LIQUOR CONTROL ET AL. Sup. Ct. Ohio. Certiorari denied. *Alvin J. Savinell* for petitioner. *William B. Saxbe,* Attorney General of Ohio, for respondents.

No. 201. PENZIEN ET AL. *v.* DIELECTRIC PRODUCTS ENGINEERING CO., INC. Sup. Ct. Mich. Certiorari denied. *Harold A. Cranefield* for petitioners. *Raymond K. Dykema* for respondent. Reported below: 374 Mich. 444, 132 N. W. 2d 130.

No. 208. MACHINERY, SCRAP IRON, METAL & STEEL CHAUFFEURS, WAREHOUSEMEN, HANDLERS, HELPERS, ALLOY FABRICATORS, THEATRICAL, EXPOSITION, CONVENTION & TRADE SHOW EMPLOYEES, LOCAL UNION NO. 714, INTERNATIONAL BROTHERHOOD OF TEAMSTERS *v.* MADDEN, REGIONAL DIRECTOR, NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. *Mayer Goldberg* for petitioner. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 343 F. 2d 497.

No. 203. McCloskey & Co., Inc. *v.* Wymard et al., Receivers. C. A. 3d Cir. Certiorari denied. *Paul M. Rhodes* and *Frederick Bernays Wiener* for petitioner. *Edward Cohen* for respondents. Reported below: 342 F. 2d 495.

No. 205. Grene *v.* United States. C. A. 5th Cir. Certiorari denied. *Joseph W. Wyatt* for petitioner. *Solicitor General Cox, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 341 F. 2d 916.

No. 207. Jacobs *v.* Tennessee. Sup. Ct. Tenn. Certiorari denied. *James H. Bateman* and *William C. Wilson* for petitioner. *George F. McCanless,* Attorney General of Tennessee, and *Thomas E. Fox,* Assistant Attorney General, for respondent.

No. 209. Lombard et al. *v.* United States. C. A. D. C. Cir. Certiorari denied. *Byron N. Scott* for petitioners. *Solicitor General Cox, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States.

No. 214. Home News Publishing Co., Inc., et al. *v.* Wirtz, Secretary of Labor. C. A. 5th Cir. Certiorari denied. *Irving M. Wolff* for petitioners. *Solicitor General Cox, Charles Donahue, Bessie Margolin* and *Robert E. Nagle* for respondent. Reported below: 341 F. 2d 20.

Nos. 215 and 314. Adjmi et al. *v.* United States. C. A. 5th Cir. Certiorari denied. *Jacob Kossman* for petitioners. *Solicitor General Cox, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: No. 215, 343 F. 2d 164; No. 314, 346 F. 2d 654.

No. 216. MACKEY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Frederick Bernays Wiener* and *Robert J. Downing* for petitioner. *Solicitor General Cox, Assistant Attorney General Jones* and *Meyer Rothwacks* for the United States. Reported below: 345 F. 2d 499.

No. 217. PEPPERIDGE FARM, INC. *v.* BRYAN, U. S. DISTRICT JUDGE. C. A. 2d Cir. Certiorari denied. *Robert MacCrate* and *Edward W. Keane* for petitioner. *Louis Nizer* for respondent.

No. 220. SMITH ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *William F. Hopkins* for petitioners. *Solicitor General Cox, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 343 F. 2d 847.

No. 221. JOE GRAHAM POST NO. 119, AMERICAN LEGION *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *William E. Logan* for petitioner. *Solicitor General Cox* and *Assistant Attorney General Jones* for the United States. Reported below: 340 F. 2d 474.

No. 225. MIAMI HERALD PUBLISHING CO. *v.* BOIRE, REGIONAL DIRECTOR, NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. *D. P. S. Paul* and *Parker D. Thomson* for petitioner. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 343 F. 2d 17.

No. 239. UNITED SPECIALTY ADVERTISING CO. ET AL. *v.* FURR'S, INC., ET AL. Ct. Civ. App. Tex., 8th Sup. Jud. Dist. Certiorari denied. *Maurice J. Hindin* and *W. B. Browder, Jr.*, for petitioners. *William L. Kerr* for respondents. Reported below: 385 S. W. 2d 456.

No. 223. CARTER *v.* WINTER ET AL. Sup. Ct. Ill. Certiorari denied. *Robert Weiner* for petitioner. *Alfred F. Newkirk, Montgomery S. Winning* and *Richard W. Galiher* for respondents. Reported below: 32 Ill. 2d 275, 204 N. E. 2d 755.

No. 224. GAUTIER, TAX ASSESSOR, ET AL. *v.* FLORIDA GREENHEART CORP. Sup. Ct. Fla. Certiorari denied. *St. Julien P. Rosemond* for petitioners. *Richard Steel* for respondent. Reported below: 172 So. 2d 589.

No. 228. BROADWELL ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Don T. Evans* for petitioners. *Solicitor General Cox, Acting Assistant Attorney General Jones, Joseph Kovner* and *George F. Lynch* for the United States. Reported below: 343 F. 2d 470.

No. 231. DUN & BRADSTREET, INC. *v.* NICKLAUS, TRUSTEE IN BANKRUPTCY. C. A. 8th Cir. Certiorari denied. *Chester Bordeau* and *Robert V. Light* for petitioner. *D. D. Panich* for respondent. Reported below: 340 F. 2d 882.

No. 233. SPINO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *John N. Stanton* for petitioner. *Solicitor General Cox, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Ronald L. Gainer* for the United States. Reported below: 345 F. 2d 372.

No. 246. VETERE ET AL. *v.* ALLEN, COMMISSIONER OF EDUCATION OF NEW YORK, ET AL. Ct. App. N. Y. Certiorari denied. *C. William Gaylor, Mason L. Hampton, Jr.,* and *James M. Marrin* for petitioners. *Charles A. Brind* for Allen et al., and *Robert L. Carter* for Mitchell et al., respondents. Reported below: 15 N. Y. 2d 259, 206 N. E. 2d 174.

No. 237. Avallone *v.* United States. C. A. 5th Cir. Certiorari denied. *Nicholas J. Capuano* for petitioner. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson* and *Philip R. Monahan* for the United States. Reported below: 341 F. 2d 296.

No. 240. McDaniel *v.* United States. C. A. 5th Cir. Certiorari denied. *Alton F. Curry* for petitioner. *Solicitor General Cox, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 343 F. 2d 785.

No. 242. McGuire *v.* United States. C. A. 6th Cir. Certiorari denied. *J. Leonard Walker* for petitioner. *Solicitor General Cox, Acting Assistant Attorney General Jones, Meyer Rothwacks* and *John M. Brant* for the United States. Reported below: 347 F. 2d 99.

No. 244. Nicole et al. *v.* Berdecia et al. Sup. Ct. Puerto Rico. Certiorari denied. *Carlos D. Vazques* for petitioners.

No. 247. Northern Lights Shopping Center, Inc. *v.* New York. Ct. App. N. Y. Certiorari denied. *Daniel F. Mathews, Sr.,* for petitioner. *Louis J. Lefkowitz,* Attorney General of New York, *Paxton Blair,* Solicitor General, and *Julius L. Sackman* for respondent. Reported below: 15 N. Y. 2d 688, 204 N. E. 2d 333.

No. 249. Fibreboard Paper Products Corp. *v.* East Bay Union of Machinists, Local 1304, United Steelworkers of America, AFL–CIO, et al. C. A. 9th Cir. Certiorari denied. *Marion B. Plant* for petitioner. *Bernard Kleiman, Elliot Bredhoff, Michael H. Gottesman* and *Jay Darwin* for respondents. Reported below: 344 F. 2d 300.

No. 248. Central Packing Co., Inc. *v.* Ryder Truck Rental, Inc. C. A. 10th Cir. Certiorari denied. *Edward A. Smith* and *George Schwegler, Jr.*, for petitioner. *Douglas Stripp* and *Russell W. Baker* for respondent. Reported below: 341 F. 2d 321.

No. 252. Estate of Sperling *v.* Commissioner of Internal Revenue. C. A. 2d Cir. Certiorari denied. *Morris Horowitz* for petitioner. *Solicitor General Cox, Assistant Attorney General Jones* and *Robert N. Anderson* for respondent. Reported below: 341 F. 2d 201.

No. 254. Clements et al. *v.* Illinois. Sup. Ct. Ill. Certiorari denied. *Charles A. Bellows* and *Julius Lucius Echeles* for petitioners. Reported below: 32 Ill. 2d 232, 204 N. E. 2d 724.

No. 255. Local 50, American Bakery & Confectionery Workers Union, AFL–CIO *v.* National Labor Relations Board. C. A. 2d Cir. Certiorari denied. *Howard N. Meyer, Henry Kaiser, George Kaufmann* and *Ronald Rosenberg* for petitioner. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 339 F. 2d 324.

No. 257. Crown Life Insurance Co. *v.* Varas. Super. Ct. Pa. Certiorari denied. *John G. Laylin* and *Owen B. Rhoads* for petitioner. *James M. Marsh* and *J. Harry LaBrum* for respondent. *Solicitor General Cox* on the memorandum for the United States transmitting the views of the Government of Canada. Reported below: 204 Pa. Super. 176, 203 A. 2d 505.

No. 259. Tomaszek *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. *Frank G. Whalen* for petitioner. Reported below: 54 Ill. App. 2d 254, 204 N. E. 2d 30.

No. 261. Hayden *v.* United States. C. A. 9th Cir. Certiorari denied. *Al Matthews* for petitioner. *Solicitor General Cox, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 343 F. 2d 459.

No. 263. Wagner *v.* United States. C. A. 2d Cir. Certiorari denied. *Moses M. Falk* for petitioner. *Solicitor General Cox, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States.

No. 264. Martin et al. *v.* New York. Ct. App. N. Y. Certiorari denied. *Robert L. Carter* and *Barbara A. Morris* for petitioners. *William Cahn* for respondent.

No. 266. Knapp-Monarch Co. *v.* Casco Products Corp. C. A. 7th Cir. Certiorari denied. *Norman Lettvin* for petitioner. *Granger Cook, Jr.,* for respondent. Reported below: 342 F. 2d 622.

No. 267. Mitchell et al. *v.* Malvern Gravel Co. Sup. Ct. Ark. Certiorari denied. *Peyton Ford* for petitioners. *James W. Chesnutt* and *Joe W. McCoy* for respondent. Reported below: 238 Ark. 848, 385 S. W. 2d 144.

No. 268. Joseph *v.* United States. C. A. 5th Cir. Certiorari denied. *G. W. Gill* for petitioner. *Solicitor General Cox, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 343 F. 2d 755.

No. 277. Silverstein *v.* United States. C. A. 2d Cir. Certiorari denied. *Boris Kostelanetz* and *Raymond Rubin* for petitioner. *Solicitor General Cox, Acting Assistant Attorney General Jones, Meyer Rothwacks* and *Burton Berkley* for the United States.

No. 262. **Burge** *v.* **United States.** C. A. 9th Cir. Certiorari denied. *Clifford J. Groh* and *George Kaufmann* for petitioner. *Solicitor General Cox, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 333 F. 2d 210; 342 F. 2d 408.

No. 271. **Quarles** *v.* **Texas.** Ct. Crim. App. Tex. Certiorari denied. Reported below: 385 S. W. 2d 395.

No. 278. **Stupak** *v.* **United States.** C. A. 3d Cir. Certiorari denied. *John E. Evans, Sr.,* for petitioner. *Solicitor General Cox, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Ronald L. Gainer* for the United States.

No. 279. **Blanchard, dba Blanchard Construction Co.** *v.* **St. Paul Fire & Marine Insurance Co.** C. A. 5th Cir. Certiorari denied. *George E. Morse* for petitioner. *Raymond A. Hepner* for respondent. Reported below: 341 F. 2d 351.

No. 284. **Stirone** *v.* **Markley, Warden.** C. A. 7th Cir. Certiorari denied. *Lloyd F. Engle, Jr.,* and *N. George Nasser* for petitioner. *Acting Solicitor General Spritzer, Assistant Attorney General Doar* and *Harold H. Greene* for respondent. Reported below: 345 F. 2d 473.

No. 286. **DiFronzo** *v.* **United States;** and
No. 287. **Calzavara** *v.* **United States.** C. A. 7th Cir. Certiorari denied. *Charles A. Bellows* for petitioner in No. 286. *George F. Callaghan, Julius Lucius Echeles* and *Melvin B. Lewis* for petitioner in No. 287. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson* and *Robert S. Erdahl* for the United States. Reported below: 345 F. 2d 383.

No. 289. YENOWINE ET AL. *v.* STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. C. A. 6th Cir. Certiorari denied. Petitioners *pro se*. *Joe H. Taylor* for respondent. Reported below: 342 F. 2d 957.

No. 292. PRIMROSE SUPER MARKET OF SALEM, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 1st Cir. Certiorari denied. *William F. Joy* for petitioner. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent.

No. 293. SHERMAN ET AL., DBA LIVERNOIS AUTO PARTS *v.* GOERLICH'S, INC., ET AL. C. A. 6th Cir. Certiorari denied. *Harry S. Stark* for petitioners. *Fred A. Smith* for respondent Goerlich's, Inc. Reported below: 341 F. 2d 988.

No. 295. WINN-DIXIE STORES, INC., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. *O. R. T. Bowden* for petitioners. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 341 F. 2d 750.

No. 296. BANKERS BOND CO., INC., ET AL. *v.* ALL STATES INVESTORS, INC., ET AL. C. A. 6th Cir. Certiorari denied. *Wilbur Fields* for petitioners. *Gavin H. Cochran* and *Royal H. Brin, Jr.*, for All States Investors, Inc., and *Henry J. Stites* for Dunne et al., respondents. Reported below: 343 F. 2d 618.

No. 297. J. A. TOBIN CONSTRUCTION CO. ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *F. Philip Kirwan* for petitioners. *Solicitor General Cox, Assistant Attorney General Weisl* and *S. Billingsley Hill* for the United States. Reported below: 343 F. 2d 422.

No. 294. MEGGE ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *LuVerne Conway* for petitioners. *Solicitor General Cox* for the United States. Reported below: 344 F. 2d 31.

No. 298. DANIEL CONSTRUCTION CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 4th Cir. Certiorari denied. *Robert T. Thompson* for petitioner. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli, Norton J. Come* and *Melvin Pollack* for respondent. Reported below: 341 F. 2d 805.

No. 299. JARVIS ET AL. *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. *Raymond K. Kierr* for petitioners. *Solicitor General Cox, Assistant Attorney General Douglas, Morton Hollander* and *Richard S. Salzman* for the United States et al.

No. 300. AMBOLD *v.* SEABOARD AIR LINE RAILROAD CO. C. A. 4th Cir. Certiorari denied. *Howard I. Legum* and *Louis B. Fine* for petitioner. *Eppa Hunton IV* and *Lewis T. Booker* for respondent. Reported below: 345 F. 2d 30.

No. 301. TEITELBAUM *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari denied. *Abraham Teitelbaum,* petitioner, *pro se. Acting Solicitor General Spritzer* and *Acting Assistant Attorney General Jones* for the United States et al. Reported below: 342 F. 2d 672.

No. 307. BENCEL, ADMINISTRATRIX, ET AL. *v.* FROST ET AL. C. A. 3d Cir. Certiorari denied. *Nathan Baker* for petitioners. *Victor C. Hansen* for respondents.

No. 309. TAYLOR *v.* BALTIMORE & OHIO RAILROAD CO. C. A. 2d Cir. Certiorari denied. *Jacob D. Fuchsberg* for petitioner. *Donald M. Dunn* and *Eugene Z. DuBose* for respondent. Reported below: 344 F. 2d 281.

No. 304. TRADEWAYS INC. *v.* CHRYSLER CORP. C. A. 2d Cir. Certiorari denied. *W. Mahlon Dickerson* for petitioner. *Francis S. Bensel* for respondent. Reported below: 342 F. 2d 350.

No. 306. ROCHESTER GAS & ELECTRIC CORP. *v.* FEDERAL POWER COMMISSION. C. A. 2d Cir. Certiorari denied. *Edward F. Huber* and *T. Carl Nixon* for petitioner. *Solicitor General Cox, Richard A. Solomon, Howard E. Wahrenbrock, Joseph B. Hobbs* and *Josephine H. Klein* for respondent. Reported below: 344 F. 2d 594.

No. 310. PEERLESS INSURANCE CO. *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. *Morris K. Siegel* and *Murray Brensilber* for petitioner. *Solicitor General Cox, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 343 F. 2d 759.

No. 311. POOL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Russell E. Parsons* for petitioner. *Solicitor General Cox, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 344 F. 2d 943.

No. 313. HAMMONS *v.* TEXAS & NEW ORLEANS RAILROAD CO. Ct. Civ. App. Tex., 12th Sup. Jud. Dist. Certiorari denied. *John P. Spiller* for petitioner. *Tom Martin Davis* for respondent. Reported below: 382 S. W. 2d 155.

No. 317. JAMES H. MATTHEWS & CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. *Nicholas Unkovic* for petitioner. *Acting Solicitor General Spritzer, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 342 F. 2d 129.

No. 316. ZOBEL *v.* SOUTH DAKOTA. Sup. Ct. S. D. Certiorari denied. *Daniel J. Andersen* for petitioner. *Frank L. Farrar,* Attorney General of South Dakota, *Walter W. Andre,* Assistant Attorney General, and *Robert A. Miller,* Special Assistant Attorney General, for respondent. Reported below: — S. D. —, 134 N. W. 2d 101.

No. 320. MASSENGILL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *R. R. Ryder* for petitioner. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 346 F. 2d 125.

No. 321. FOTOCHROME, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied. *Louis Fischoff* for petitioner. *Acting Solicitor General Spritzer, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 343 F. 2d 631.

No. 322. STEVENSON ET AL. *v.* SILVERMAN ET AL. Sup. Ct. Pa. Certiorari denied. *Lawrence J. Richette* for petitioners. *Samuel D. Slade* for respondents. Reported below: 417 Pa. 187, 208 A. 2d 786.

No. 324. WILSON ET AL. *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. *Lloyd F. Love* for petitioners. Reported below: 247 La. 405, 171 So. 2d 664.

No. 325. DEWELLES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *A. L. Wirin* and *Fred Okrand* for petitioner. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Ronald L. Gainer* for the United States. Reported below: 345 F. 2d 387.

No. 327. Buck *v.* Superior Court of California. Sup. Ct. Cal. Certiorari denied. *Sorrell Trope* and *Eugene L. Trope* for petitioner.

No. 329. Hasbrook et ux. *v.* United States. C. A. 2d Cir. Certiorari denied. *Charles D. Post* for petitioners. *Acting Solicitor General Spritzer* and *Acting Assistant Attorney General Jones* for the United States. Reported below: 343 F. 2d 811.

No. 330. Wade *v.* United States. C. A. 5th Cir. Certiorari denied. *Zach H. Douglas* for petitioner. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 344 F. 2d 1016.

No. 331. Coleman *v.* McGettrick, Sheriff. Sup. Ct. Ohio. Certiorari denied. *James R. Willis* for petitioner. *John T. Corrigan* for respondent. Reported below: 2 Ohio St. 2d 177, 207 N. E. 2d 552.

No. 332. Studemeyer *v.* Macy, Chairman, U. S. Civil Service Commission, et al. C. A. D. C. Cir. Certiorari denied. *Donald M. Murtha* and *Claude L. Dawson* for petitioner. *Acting Solicitor General Spritzer* for respondents. Reported below: 120 U. S. App. D. C. 259, 345 F. 2d 748.

No. 335. Florida East Coast Railway *v.* Martin County, Florida. Sup. Ct. Fla. Certiorari denied. *David W. Peck* and *Roy H. Steyer* for petitioner. *Dean Tooker* for respondent. Reported below: 171 So. 2d 873.

No. 342. Palisi *v.* Louisville & Nashville Railroad Co., Inc. C. A. 5th Cir. Certiorari denied. *Albert Sidney Johnston, Jr.,* for petitioner. *A. F. Lankford III* for respondent. Reported below: 342 F. 2d 799.

No. 333. HULBURT OIL & GREASE CO. OF ILLINOIS *v.* HULBURT OIL & GREASE CO. OF PENNSYLVANIA. C. A. 7th Cir. Certiorari denied. *J. Willison Smith, Jr.,* for petitioner. *Norman A. Miller* for respondent. Reported below: 346 F. 2d 260.

No. 334. NATIONAL MARITIME UNION OF AMERICA, AFL-CIO *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied. *Abraham E. Freedman* for petitioner. *Acting Solicitor General Spritzer, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 342 F. 2d 538.

No. 339. VERZI ET AL. *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. *Marvin A. Koblentz* for petitioners.

No. 340. IN-SINK-ERATOR MANUFACTURING CO. *v.* WASTE KING CORP. C. A. 7th Cir. Certiorari denied. *Charles B. Cannon* and *George J. Kuehnl* for petitioner. *Ford W. Harris, Jr.,* for respondent. Reported below: 346 F. 2d 248.

No. 344. MICHIGAN MUTUAL LIABILITY CO. ET AL. *v.* ARRIEN, DEPUTY COMMISSIONER, BUREAU OF EMPLOYEES COMPENSATION, U. S. DEPARTMENT OF LABOR, ET AL. C. A. 2d Cir. Certiorari denied. *James B. Magnor* and *Charles N. Fiddler* for petitioners. *Acting Solicitor General Spritzer, Assistant Attorney General Douglas, Alan S. Rosenthal* and *David L. Rose* for respondents. Reported below: 344 F. 2d 640.

No. 348. KRYSTOFORSKI *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *George F. Mehling* for petitioner. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 350. RUHL *v.* RAILROAD RETIREMENT BOARD. C. A. 7th Cir. Certiorari denied. *Anthony A. DiGrazia, Harry A. Carlson* and *Hugh M. Matchett* for petitioner. *Acting Solicitor General Spritzer, Assistant Attorney General Douglas, Morton Hollander* and *Richard S. Salzman* for respondent. Reported below: 342 F. 2d 662.

No. 353. KOHLER CO. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. D. C. Cir. Certiorari denied. *Lyman C. Conger, Edward J. Hammer* and *E. Riley Casey* for petitioner. *Acting Solicitor General Spritzer, Arnold Ordman, Dominick L. Manoli, Norton J. Come* and *Nancy M. Sherman* for the National Labor Relations Board, and *Joseph L. Rauh, Jr., John Silard* and *Stephen I. Schlossberg* for Local 833, United Automobile, Aircraft and Agricultural Implement Workers, respondents. Briefs of *amici curiae,* in support of the petition, were filed by *Eugene Adams Keeney* and *Guy Farmer* for the Chamber of Commerce of the United States, by *Lambert H. Miller* for the National Association of Manufacturers of the United States, and by *Walter S. Davis* for the Wisconsin Manufacturers' Association. Reported below: 112 U. S. App. D. C. 107, 300 F. 2d 699; 120 U. S. App. D. C. 259, 345 F. 2d 748.

No. 359. JOHNSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *L. W. Massey* for petitioner. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 345 F. 2d 457.

No. 360. MARSHALL ET AL. *v.* MAYOR AND BOARD OF SELECTMEN, CITY OF MCCOMB. Sup. Ct. Miss. Certiorari denied. *Robert L. Carter, Barbara A. Morris* and *Jack H. Young* for petitioners. Reported below: 251 Miss. 750, 171 So. 2d 347.

No. 356. I. Posner, Inc., et al. *v.* National Labor Relations Board. C. A. 2d Cir. Certiorari denied. *Isidore Drimmer* and *Daniel H. Greenberg* for petitioners. *Acting Solicitor General Spritzer, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 342 F. 2d 826.

No. 361. Kamsler *v.* H. A. Seinscheimer Co. C. A. 7th Cir. Certiorari denied. Petitioner *pro se. David Jacker* for respondent. Reported below: 347 F. 2d 740.

No. 362. Matthews, Trustee in Bankruptcy *v.* James Talcott, Inc. C. A. 7th Cir. Certiorari denied. *C. Severin Buschmann* for petitioner. *Charles B. Feibleman* and *Gene E. Wilkins* for respondent. Reported below: 345 F. 2d 374.

No. 363. Perry *v.* Zysset et al. C. A. 7th Cir. Certiorari denied. *George B. Christensen* for petitioner. *Albin C. Ahlberg* and *Warren C. Horton* for respondents.

No. 364. Froehlich et al. *v.* District Judges, U. S. District Court for the Southern District of New York, et al. C. A. 2d Cir. Certiorari denied. *Harold Dublirer* for petitioners. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Julia P. Cooper* for respondents.

No. 365. Lux Art Van Service, Inc. *v.* Pollard. C. A. 9th Cir. Certiorari denied. *Sidney Weissberger* for petitioner. *Raymond F. Hayes* for respondent. Reported below: 344 F. 2d 883.

No. 370. Hammonds et al. *v.* City of Corpus Christi. C. A. 5th Cir. Certiorari denied. *Sidney P. Chandler* for petitioners. *I. M. Singer* for respondent. Reported below: 343 F. 2d 162.

No. 369. Hamadeh *v.* Immigration and Naturalization Service. C. A. 7th Cir. Certiorari denied. *Otto Oplatka* for petitioner. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Daniel H. Benson* for respondent. Reported below: 343 F. 2d 530.

No. 371. McCarthy et ux. *v.* Conley, District Director of Internal Revenue. C. A. 2d Cir. Certiorari denied. *Edward P. J. McCarthy* for petitioners. *Acting Solicitor General Spritzer* and *Acting Assistant Attorney General Jones* for respondent. Reported below: 341 F. 2d 948.

No. 374. Smith *v.* Crouch, Sheriff. Sup. Ct. Tenn. Certiorari denied. *Bernard H. Cantor* for petitioner. *George F. McCanless,* Attorney General of Tennessee, and *Edgar P. Calhoun,* Assistant Attorney General, for respondent.

No. 376. Paine Drug Co. *v.* New York. County Ct., Monroe County, N. Y. Certiorari denied. *Robert L. Beck* for petitioner. Reported below: 39 Misc. 2d 824, 241 N. Y. S. 2d 946.

No. 377. Angelini *v.* United States. C. A. 7th Cir. Certiorari denied. *Anna R. Lavin* for petitioner. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 346 F. 2d 278.

No. 378. Howard *v.* United States. C. A. 1st Cir. Certiorari denied. *Stanley H. Rudman* for petitioner. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Ronald L. Gainer* for the United States. Reported below: 345 F. 2d 126.

No. 379. ROBINSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Jacob A. Dickinson, Sam A. Crow* and *Bill G. Honeyman* for petitioner. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 345 F. 2d 1006.

No. 380. ROBINSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Jacob A. Dickinson, Sam A. Crow* and *Bill G. Honeyman* for petitioner. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 345 F. 2d 1007.

No. 381. RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL UNIONS NOS. 128, 633 AND 954 *v.* LION DRY GOODS, INC., ET AL. C. A. 6th Cir. Certiorari denied. *Joseph E. Finley, Sol G. Lippman* and *Tim L. Bornstein* for petitioners. *Merritt W. Green* for respondents. Reported below: 341 F. 2d 715.

No. 388. CHISHOLM, ADMINISTRATRIX, ET AL. *v.* BILLINGS, EXECUTOR, ET AL. Sup. Ct. Ga. Certiorari denied. *Hamilton Douglas* for petitioners. *George E. C. Hayes* for respondents. Reported below: 220 Ga. 870, 142 S. E. 2d 781.

No. 390. MACHEL *v.* CALIFORNIA. Dist. Ct. App. Cal., 1st App. Dist. Certiorari denied. *James C. Purcell* for petitioner. Reported below: 234 Cal. App. 2d 37, 44 Cal. Rptr. 126.

No. 394. HESMER FOODS, INC. *v.* CAMPBELL SOUP CO. C. A. 7th Cir. Certiorari denied. *John D. Clouse* for petitioner. *Thomas M. Scanlon* and *Richard E. Deer* for respondent. Reported below: 346 F. 2d 356.

No. 389. Garcia-Gonzales *v.* Immigration and Naturalization Service. C. A. 9th Cir. Certiorari denied. *Joseph S. Hertogs* for petitioner. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for respondent. Reported below: 344 F. 2d 804.

No. 393. Sill Corp. *v.* United States. C. A. 10th Cir. Certiorari denied. *Roland Boyd, John J. Geraghty* and *William VanDercreek* for petitioner. *Acting Solicitor General Spritzer, Assistant Attorney General Weisl, Roger P. Marquis* and *Raymond N. Zagone* for the United States. Reported below: 343 F. 2d 411.

No. 403. National Maritime Union of America, AFL-CIO *v.* National Labor Relations Board. C. A. D. C. Cir. Certiorari denied. *Abraham E. Freedman* for petitioner. *Acting Solicitor General Spritzer, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 120 U. S. App. D. C. 299, 346 F. 2d 411.

No. 405. Semel *v.* United States. C. A. 4th Cir. Certiorari denied. *Joseph J. Lyman* and *Josiah Lyman* for petitioner. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 347 F. 2d 228.

No. 128. Willheim et al. *v.* Murchison et al., dba Murchison Brothers, et al. C. A. 2d Cir. Certiorari denied. Mr. Justice Fortas took no part in the consideration or decision of this petition. *Leonard I. Schreiber* for petitioners. *Stuart N. Updike* for Murchison et al., and *Samuel E. Gates* and *Robert J. Geniesse* for Investors Diversified Services, Inc., respondents. Reported below: 342 F. 2d 33.

No. 114. Carlo Bianchi & Co., Inc. *v.* United States. Ct. Cl. Motion to use record in No. 529, October Term, 1962, granted. Certiorari denied. *William H. Matthews* for petitioner. *Solicitor General Cox, Assistant Attorney General Douglas, Morton Hollander* and *David L. Rose* for the United States. Reported below: 167 Ct. Cl. 364.

No. 137. V. L. Smithers Manufacturing Co. *v.* O'Brien et al., dba Illinois Wholesale Florist. C. A. 7th Cir. Certiorari denied. Mr. Justice Fortas took no part in the consideration or decision of this petition. *H. F. McNenny* for petitioner. *John Rex Allen* for respondents. Reported below: 340 F. 2d 952.

No. 160. Brotherhood of Locomotive Firemen & Enginemen *v.* Central of Georgia Railway Co. C. A. 5th Cir. Certiorari denied. Mr. Justice Fortas took no part in the consideration or decision of this petition. *Harold C. Heiss* and *Russell B. Day* for petitioner. *John B. Miller, Charles J. Bloch, W. Graham Claytor, Jr.,* and *Richard S. Arnold* for respondent. Reported below: 341 F. 2d 213.

No. 182. Jachimiec *v.* Schenley Industries, Inc., et al. C. A. 7th Cir. Certiorari denied. Mr. Justice Fortas took no part in the consideration or decision of this petition. *Milton V. Freeman* and *Sheldon O. Collen* for petitioner. *Sidney R. Zatz, Milton H. Cohen* and *Peyton Ford* for respondents.

No. 265. Brandano et al. *v.* Handman et al. C. A. 1st Cir. Certiorari denied. Mr. Justice Fortas took no part in the consideration or decision of this petition. *Joseph Zallen* for petitioners. *Diana J. Auger* for respondents.

No. 155. Hughes Tool Co. *v.* Trans World Airlines, Inc. C. A. 2d Cir. Certiorari denied. Mr. Justice Fortas took no part in the consideration or decision of this petition. *Chester C. Davis* for petitioner. *John F. Sonnett, Carl S. Rowe, Dudley B. Tenney, Marshall H. Cox, Jr.,* and *Abraham P. Ordover* for respondent. Reported below: 339 F. 2d 56.

No. 222. Atlas-Pacific Engineering Co. *v.* Geo. W. Ashlock Co. C. A. 9th Cir. Certiorari denied. Mr. Justice Fortas took no part in the consideration or decision of this petition. *Edward B. Gregg* and *Melvin R. Stidham* for petitioner. *Frank A. Neal* and *James M. Naylor* for respondent. Reported below: 339 F. 2d 288.

No. 272. Caparotta, dba Kings Brush Co. *v.* American Technical Machinery Corp. C. A. 2d Cir. Certiorari denied. Mr. Justice Fortas took no part in the consideration or decision of this petition. *Ralph L. Chappell* for petitioner. *John M. Calimafde* for respondent. Reported below: 339 F. 2d 557.

No. 288. Welsh Co. *v.* Chernivsky, dba Comfy Babe Co. C. A. 7th Cir. Certiorari denied. Mr. Justice Fortas took no part in the consideration or decision of this petition. *Lawrence H. Cohn* and *Ewing Laporte* for petitioner. *John Rex Allen* for respondent. Reported below: 342 F. 2d 586.

No. 302. Mortimer *v.* United States. C. A. 7th Cir. Certiorari denied. Mr. Justice Fortas took no part in the consideration or decision of this petition. *Abe Krash* and *John F. Kelly* for petitioner. *Solicitor General Cox, Acting Assistant Attorney General Jones* and *John P. Burke* for the United States. Reported below: 343 F. 2d 500.

No. 328. Space Aero Products Co., Inc., et al. *v.* R. E. Darling Co., Inc. Ct. App. Md. Certiorari denied. Mr. Justice Fortas took no part in the consideration or decision of this petition. *Abe Fortas, Dennis G. Lyons, Joseph Sherbow, Edward F. Shea, Jr.,* and *Rourke J. Sheehan* for petitioners. *James P. Donovan* and *Jack H. Olender* for respondent. Reported below: 238 Md. 93, 208 A. 2d 74.

No. 337. Hanson et al. *v.* No-Joint Concrete Pipe Co. C. A. 9th Cir. Certiorari denied. Mr. Justice Fortas took no part in the consideration or decision of this petition. *Charles F. Scanlan* for petitioners. *Jack E. Hursh* for respondent. Reported below: 344 F. 2d 13.

No. 354. S. W. Farber, Inc. *v.* Texas Instruments, Inc. C. A. 3d Cir. Certiorari denied. Mr. Justice Fortas took no part in the consideration or decision of this petition. *Hobart N. Durham, John C. Vassil* and *Thomas N. O'Neill, Jr.,* for petitioner. *Robert F. Davis* for respondent. Reported below: 344 F. 2d 957.

No. 398. Doyle *v.* United States. C. A. 2d Cir. Certiorari denied. Mr. Justice Fortas took no part in the consideration or decision or this petition. *Moses Krislov* and *Arthur H. Christy* for petitioner. *Acting Solicitor General Spritzer* for the United States. Reported below: 348 F. 2d 715.

No. 181. Burchinal *v.* United States. C. A. 10th Cir. Motion to dispense with printing the petition granted. Certiorari denied. *Isaac Mellman* and *Gerald N. Mellman* for petitioner. *Solicitor General Cox, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 342 F. 2d 982.

No. 150. HALUSKA *v.* GARDNER, SECRETARY OF HEALTH, EDUCATION AND WELFARE. C. A. 8th Cir. Motion to dispense with printing the petition granted. Certiorari denied. Petitioner *pro se.* *Solicitor General Cox* for respondent.

No. 163. LYNCH *v.* INDUSTRIAL INDEMNITY CO. ET AL. C. A. 9th Cir. Motion to dispense with printing the petition granted. Certiorari denied.

No. 202. FRANKLIN ET UX. *v.* UNITED STATES ET AL. C. A. 7th Cir. Motion to dispense with printing the petition granted. Certiorari denied. *Harry L. Arkin* for petitioners. *Solicitor General Cox* for the United States et al., and *Newell S. Boardman* and *Jay M. Smyser* for Chicago Helicopter Airways, Inc., et al., respondents. Reported below: 342 F. 2d 581.

No. 232. MARTH ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Motion to dispense with printing the petition granted. Certiorari denied. Petitioners *pro se.* *Solicitor General Cox, Acting Assistant Attorney General Jones* and *Harold C. Wilkenfeld* for respondent. Reported below: 342 F. 2d 417.

No. 273. CUBAN TRUCK & EQUIPMENT CO. *v.* UNITED STATES. Ct. Cl. Motion to dispense with printing the petition granted. Certiorari denied. *Charles Bragman* for petitioner. *Acting Solicitor General Spritzer* for the United States. Reported below: 166 Ct. Cl. 381, 333 F. 2d 873.

No. 401. TOMIYASU ET AL. *v.* GOLDEN ET UX. Sup. Ct. Nev. Motion to dispense with printing the petition granted. Certiorari denied. *Harry E. Claiborne* for petitioners. *Howard W. Babcock* for respondents. Reported below: 81 Nev. 140, 400 P. 2d 415.

No. 151. DARGUSCH *v.* COLUMBUS BAR ASSOCIATION. Sup. Ct. Ohio. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. MR. JUSTICE STEWART took no part in the consideration or decision of this petition. *Joseph L. Rauh, Jr., John Silard* and *Carlton S. Dargusch, Jr.*, for petitioner. *John L. Davies, Jr.*, and *Sol Morton Isaac* for respondent. Reported below: 177 Ohio St. 95, 202 N. E. 2d 625.

No. 158. EASTERN AIR LINES, INC., ET AL. *v.* NORTHEAST AIRLINES, INC., ET AL. C. A. 1st Cir. Motion of International Association of Machinists et al. to be named parties respondent granted. Motion for leave to supplement the petition granted. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE FORTAS took no part in the consideration or decision of these motions or the petition. *John W. Cross, E. Smythe Gambrell* and *Harold L. Russell* for petitioners. *Henry E. Foley* and *Loyd M. Starrett* for respondent Northeast Airlines, Inc. *Edward J. Hickey, Jr., James L. Highsaw, Jr.*, and *William J. Hickey* for International Association of Machinists et al. Reported below: 345 F. 2d 484, 488.

No. 180. TATUM ET AL. *v.* SINGER ET AL. Sup. Ct. Miss. Motion for abstention denied. Certiorari denied. *Joshua Green* and *Garner W. Green* for petitioners. *John C. Satterfield* for respondents. Reported below: 251 Miss. 661, 171 So. 2d 134.

No. 213. SHELTON *v.* MISSOURI-KANSAS-TEXAS RAILROAD CO. Ct. Civ. App. Tex., 5th Sup. Jud. Dist. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Charles Gullett, Robert Doss* and *Russell M. Baker* for petitioner. *William Ralph Elliott* for respondent. Reported below: 383 S. W. 2d 842.

No. 250. Stitzel-Weller Distillery *v.* Department of Revenue of Kentucky. Ct. App. Ky. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. *Millard Cox* for petitioner. *William S. Riley,* Assistant Attorney General of Kentucky, for respondent. Reported below: 387 S. W. 2d 602.

No. 315. Fuentes-Torres *v.* Immigration and Naturalization Service. C. A. 9th Cir. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. *Milton T. Simmons* for petitioner. *Solicitor General Cox, Assistant Attorney General Vinson* and *Philip R. Monahan* for respondent. Reported below: 344 F. 2d 911.

No. 338. Mohr et al. *v.* State Highway Commission of Missouri. Sup. Ct. Mo. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. *Hyman G. Stein* for petitioners. *Robert L. Hyder* for respondent. Reported below: 388 S. W. 2d 855, 862.

Nos. 235 and 251. Gradsky *v.* United States. C. A. 5th Cir. Motion of B. J. Gradsky to be added as party petitioner in No. 235 denied. Certiorari denied. *Sidney M. Dubbin* for petitioner in No. 235. *Milton E. Grusmark* for petitioner in No. 251. *Solicitor General Cox, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 342 F. 2d 426.

No. 6, Misc. McCoy *v.* California. C. A. 9th Cir. Certiorari denied. Petitioner *pro se.* *Thomas C. Lynch,* Attorney General of California, and *Albert W. Harris, Jr.,* and *Jay S. Linderman,* Deputy Attorneys General, for respondent.

No. 253. **Mohasco Industries, Inc.** *v.* **E. T. Barwick Mills, Inc., et al.** C. A. 5th Cir. Motion for leave to file supplement to the petition granted. Certiorari denied. Mr. Justice Fortas took no part in the consideration or decision of the motion or the petition. *Stanton T. Lawrence, Jr.*, for petitioner. *Charles H. Walker* for respondents. Reported below: 340 F. 2d 319.

No. 260. **Nyyssonen, Administratrix** *v.* **Bendix Corp.** C. A. 1st Cir. Motion for leave to supplement the record granted. Certiorari denied. Mr. Justice Fortas took no part in the consideration or decision of this motion and petition. *David Rines* and *Robert H. Rines* for petitioner. *Morris Relson* for respondent. Reported below: 342 F. 2d 531.

No. 7, Misc. **Taylor** *v.* **United States.** C. A. 6th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox* for the United States.

No. 8, Misc. **Morris** *v.* **Missouri.** Sup. Ct. Mo. Certiorari denied. Petitioner *pro se. Norman H. Anderson,* Attorney General of Missouri, and *William A. Peterson* and *Howard L. McFadden,* Assistant Attorneys General, for respondent.

No. 16, Misc. **Butler** *v.* **United States.** C. A. 8th Cir. Certiorari denied. *Francis Breidenbach* for petitioner. *Solicitor General Cox, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 340 F. 2d 63.

No. 17, Misc. **Oyler** *v.* **Willingham, Warden.** C. A. 10th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Doar* and *Harold H. Greene* for respondent. Reported below: 338 F. 2d 260.

No. 9, Misc. GRAVLEY *v.* CARTER. Super. Ct. Bartow County, Ga. Certiorari denied. Petitioner *pro se*. *Albert Sidney Johnson,* Assistant Attorney General of Georgia, for respondent.

No. 13, Misc. BROWN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Doar* and *Harold H. Greene* for the United States.

No. 20, Misc. LEBRON *v.* WARDEN OF DETENTION HEADQUARTERS. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Doar* and *Harold H. Greene* for respondent. Reported below: 339 F. 2d 887.

No. 26, Misc. VATELLI *v.* WILSON, WARDEN. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Thomas C. Lynch,* Attorney General of California, and *Albert W. Harris, Jr.,* and *Derald E. Granberg,* Deputy Attorneys General, for respondent.

No. 27, Misc. GORI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 339 F. 2d 263.

No. 31, Misc. LEWIS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Petitioner *pro se*. *William G. Clark,* Attorney General of Illinois, and *Richard A. Michael,* Assistant Attorney General, for respondent.

No. 32, Misc. SMITH *v.* TAYLOR, WARDEN. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Doar* and *Harold H. Greene* for respondent.

No. 21, Misc. SCALZO *v.* HURNEY, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 3d Cir. Certiorari denied. *Richard R. Ransom* for petitioner. *Solicitor General Cox, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Jerome M. Feit* for respondent. Reported below: 338 F. 2d 339.

No. 33, Misc. PURIFOY *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Petitioner *pro se. Earl Faircloth,* Attorney General of Florida, and *James G. Mahorner,* Assistant Attorney General, for respondent.

No. 34, Misc. HYDE *v.* MCMANN, WARDEN. C. A. 2d Cir. Certiorari denied. Petitioner *pro se. Louis J. Lefkowitz,* Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Frank J. Panizzo,* Assistant Attorney General, for respondent.

No. 36, Misc. WILSON *v.* MCGEE, ADMINISTRATOR, ET AL. C. A. 9th Cir. Certiorari denied. Petitioner *pro se. Thomas C. Lynch,* Attorney General of California, *Albert W. Harris, Jr.,* and *Michael R. Marron,* Deputy Attorneys General, for respondents.

No. 39, Misc. KAUFMAN *v.* TAXICAB BUREAU, BALTIMORE CITY POLICE DEPARTMENT. Ct. App. Md. Certiorari denied. *Leonard J. Kerpelman* for petitioner. Reported below: 236 Md. 476, 204 A. 2d 521.

No. 41, Misc. REED *v.* UNITED STATES. Ct. Cl. Certiorari denied. Petitioner *pro se. Solicitor General Cox* for the United States.

No. 42, Misc. SAMURINE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox* for the United States. Reported below: 337 F. 2d 857.

No. 44, Misc. NORRIS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Frederick R. Tourkow* and *Richard C. Ver Wiebe* for petitioner. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 341 F. 2d 527.

No. 45, Misc. DEGREGORY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Eleanor Jackson Piel* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Daniel H. Benson* for the United States. Reported below: 341 F. 2d 277.

No. 46, Misc. LUCAS *v.* MCMANN, WARDEN. C. A. 2d Cir. Certiorari denied. Petitioner *pro se. Frank S. Hogan* and *H. Richard Uviller* for respondent.

No. 47, Misc. CURRY *v.* WEAKLEY, REFORMATORY SUPERINTENDENT, ET AL. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Doar, Harold H. Greene* and *Gerald P. Choppin* for respondents.

No. 48, Misc. ACOSTA *v.* FITZHARRIS, CORRECTIONAL SUPERINTENDENT. C. A. 9th Cir. Certiorari denied. Petitioner *pro se. Thomas C. Lynch*, Attorney General of California, *Albert W. Harris, Jr.*, Assistant Attorney General, and *Robert R. Granucci*, Deputy Attorney General, for respondent.

No. 50, Misc. KLEIN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 340 F. 2d 547.

No. 49, Misc. Luaces *v.* May, Warden. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Doar,* and *Harold H. Greene* for respondent.

No. 51, Misc. Prysock *v.* Weakley, Reformatory Superintendent. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Doar* and *Harold H. Greene* for respondent.

No. 57, Misc. Doub *v.* United States. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 341 F. 2d 572.

No. 61, Misc. Johnson *v.* United States. C. A. D. C. Cir. Certiorari denied. *James J. Laughlin* and *William J. Garber* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States.

No. 62, Misc. Von Atzinger *v.* New Jersey. Sup. Ct. N. J. Certiorari denied. Petitioner *pro se*. *John G. Thevos* for respondent.

No. 63, Misc. Barnes *v.* United States. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 71, Misc. Richardson *v.* Markley, Warden. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Doar* and *Harold H. Greene* for respondent. Reported below: 339 F. 2d 967.

No. 64, Misc. Davis *v.* United States. C. A. D. C. Cir. Certiorari denied. *Russell Morton Brown, Maurice C. Goodpasture* and *John J. Dwyer* for petitioner. *Solicitor General Cox, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Julia P. Cooper* for the United States.

No. 67, Misc. Miller *v.* United States. C. A. 6th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox* for the United States.

No. 73, Misc. Fennell *v.* United States. C. A. 10th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Ronald L. Gainer* for the United States. Reported below: 339 F. 2d 920.

No. 74, Misc. Grizzell *v.* Wainwright, Corrections Director. C. A. 5th Cir. Certiorari denied. Petitioner *pro se. Earl Faircloth,* Attorney General of Florida, and *William D. Roth,* Special Assistant Attorney General, for respondent.

No. 76, Misc. Peterson *v.* United States. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox* for the United States.

No. 78, Misc. Baylor *v.* United States. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 120 U. S. App. D. C. 157, 344 F. 2d 542.

No. 83, Misc. Muench *v.* Beto, Corrections Director. C. A. 5th Cir. Certiorari denied. Reported below: 340 F. 2d 307.

No. 82, Misc. Higginbotham *v.* United States Civil Service Commission. C. A. 3d Cir. Certiorari denied. *Paul A. Simmons* for petitioner. *Solicitor General Cox, Assistant Attorney General Douglas, Sherman L. Cohn* and *Richard S. Salzman* for respondent. Reported below: 340 F. 2d 165.

No. 84, Misc. Crain *v.* Texas. Ct. Crim. App. Tex. Certiorari denied. Petitioner *pro se. Waggoner Carr,* Attorney General of Texas, *Hawthorne Phillips,* First Assistant Attorney General, *T. B. Wright,* Executive Assistant Attorney General, and *Howard M. Fender* and *Charles B. Swanner,* Assistant Attorneys General, for respondent.

No. 86, Misc. Daly *v.* United States. C. A. D. C. Cir. Certiorari denied. *John J. Dwyer* and *Jean F. Dwyer* for petitioner. *Solicitor General Cox* for the United States. Reported below: 119 U. S. App. D. C. 353, 342 F. 2d 932.

No. 88, Misc. Wears *v.* Ohio et al. Sup. Ct. Ohio. Certiorari denied.

No. 89, Misc. Montgomery *v.* New York. Ct. App. N. Y. Certiorari denied. *Robert Welch Mullen* for petitioner. Reported below: 15 N. Y. 2d 732, 205 N. E. 2d 206.

No. 95, Misc. Waltreus *v.* California. Sup. Ct. Cal. Certiorari denied. *Morris Lavine* for petitioner. Reported below: 62 Cal. 2d 218, 397 P. 2d 1001.

No. 96, Misc. Steenbergen *v.* Illinois. Sup. Ct. Ill. Certiorari denied. *John R. Snively* for petitioner. Reported below: 31 Ill. 2d 615, 203 N. E. 2d 404.

No. 92, Misc. **Bridges** *v.* **Florida.** Sup. Ct. Fla. Certiorari denied. Petitioner *pro se*. *Earl Faircloth,* Attorney General of Florida, and *John S. Burton,* Assistant Attorney General, for respondent.

No. 94, Misc. **Sten** *v.* **United States.** C. A. 2d Cir. Certiorari denied. *Osmond K. Fraenkel* for petitioner. *Solicitor General Cox, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Ronald L. Gainer* for the United States. Reported below: 342 F. 2d 491.

No. 98, Misc. **McAbee** *v.* **United States.** C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 101, Misc. **Duval** *v.* **United States.** C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States.

No. 104, Misc. **Black** *v.* **United States.** C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 341 F. 2d 583.

No. 106, Misc. **Everist** *v.* **Illinois.** App. Ct. Ill., 1st Dist. Certiorari denied. *R. Eugene Pincham* and *Charles B. Evins* for petitioner. *Daniel P. Ward* and *Elmer C. Kissane* for respondent. Reported below: 52 Ill. App. 2d 73, 201 N. E. 2d 655.

No. 109, Misc. **McMullen** *v.* **Gardner, Secretary of Health, Education and Welfare.** C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for respondent. Reported below: 335 F. 2d 811.

No. 108, Misc. THOMAS ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *R. Eugene Pincham* for petitioners. *Solicitor General Cox, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Marshall Tamor Golding* for the United States. Reported below: 342 F. 2d 132.

No. 110, Misc. WHITTINGTON *v.* CAMERON, HOSPITAL SUPERINTENDENT. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se. Acting Solicitor General Spritzer, Assistant Attorney General Doar* and *Harold H. Greene* for respondent. Reported below: 120 U. S. App. D. C. 179, 344 F. 2d 564.

No. 111, Misc. LEAK *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 112, Misc. CERRANO *v.* FLEISHMAN, CUSTOMS AGENT, ET AL. C. A. 2d Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Douglas, Morton Hollander* and *Edward Berlin* for respondents. Reported below: 339 F. 2d 929.

No. 113, Misc. MYARTT *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied.

No. 118, Misc. VAUGHN *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 119, Misc. RICHMOND *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Sup. Ct. Fla. Certiorari denied. Petitioner *pro se. Earl Faircloth,* Attorney General of Florida, and *James G. Mahorner,* Assistant Attorney General, for respondent.

No. 121, Misc. SILVER *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 122, Misc. SHELTON ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Samuel K. Abrams* for petitioners. *Solicitor General Cox, Beatrice Rosenberg* and *Ronald L. Gainer* for the United States. Reported below: 120 U. S. App. D. C. 65, 343 F. 2d 347.

No. 123, Misc. CRANE ET AL. *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 126, Misc. DE VAUGHN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Leon B. Polsky* for petitioner. *Solicitor General Cox, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Jerome M. Feit* for the United States.

No. 127, Misc. SANCHEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Stephen R. Reinhardt* for petitioner. *Solicitor General Cox, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 341 F. 2d 225.

No. 129, Misc. TAYLOR *v.* WARD ET AL. Ct. App. Md. Certiorari denied. *Leonard J. Kerpelman* for petitioner.

No. 133, Misc. SPIESEL *v.* CITY OF NEW YORK. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Leo A. Larkin, Seymour B. Quel* and *Benjamin Offner* for respondent. Reported below: 342 F. 2d 800.

No. 135, Misc. HAIRSTON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States.

No. 132, Misc. **Allen** *v.* **Rundle, Correctional Superintendent.** C. A. 3d Cir. Certiorari denied.

No. 134, Misc. **Whitworth** *v.* **Florida.** Sup. Ct. Fla. Certiorari denied.

No. 136, Misc. **Durham** *v.* **Missouri.** Sup. Ct. Mo. Certiorari denied.

No. 138, Misc. **Summers** *v.* **California.** Dist. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 139, Misc. **McKenna** *v.* **Myers, Correctional Superintendent.** C. A. 3d Cir. Certiorari denied. Reported below: 342 F. 2d 998.

No. 143, Misc. **Bales** *v.* **Hayes.** C. A. 9th Cir. Certiorari denied.

No. 144, Misc. **Harris** *v.* **Myers, Correctional Superintendent.** C. A. 3d Cir. Certiorari denied.

No. 145, Misc. **Woody** *v.* **Missouri.** Sup. Ct. Mo. Certiorari denied.

No. 146, Misc. **Williams** *v.* **United States.** C. A. 8th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox* for the United States. Reported below: 344 F. 2d 264.

No. 149, Misc. **Thompson** *v.* **Heinze, Warden.** C. A. 9th Cir. Certiorari denied.

No. 150, Misc. **Carter** *v.* **United States.** C. A. 5th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox* for the United States.

No. 151, Misc. **Fields** *v.* **California.** Sup. Ct. Cal. Certiorari denied.

No. 152, Misc. **Elksnis** *v.* **Fay, Warden.** C. A. 2d Cir. Certiorari denied.

No. 153, Misc. **Olson** *v.* **Tahash, Warden.** C. A. 8th Cir. Certiorari denied. Reported below: 344 F. 2d 139.

No. 154, Misc. **Arnold** *v.* **Bostick.** C. A. 9th Cir. Certiorari denied. Reported below: 339 F. 2d 879.

No. 156, Misc. **Capolino** *v.* **Kelly, Collector of Customs.** C. A. 2d Cir. Certiorari denied. *Leo Otis* for petitioner. *Solicitor General Cox* for respondent. Reported below: 339 F. 2d 1023.

No. 157, Misc. **Hudson** *v.* **Arceneaux et al.** Sup. Ct. La. Certiorari denied. *J. Minos Simon* for petitioner.

No. 159, Misc. **Burton** *v.* **Indiana.** Sup. Ct. Ind. Certiorari denied. Reported below: — Ind. —, 202 N. E. 2d 165; — Ind. —, 204 N. E. 2d 218.

No. 160, Misc. **Williams** *v.* **United States.** C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 343 F. 2d 472.

No. 161, Misc. **Pearson et ux.** *v.* **Birdwell et al.** Sup. Ct. Cal. Certiorari denied. *Edgar Paul Boyko* for petitioners.

No. 163, Misc. **Maddox** *v.* **Holman, Warden.** C. A. 5th Cir. Certiorari denied.

No. 164, Misc. Riffle *v.* United States District Court for the Northern District of Ohio. C. A. 6th Cir. Certiorari denied.

No. 165, Misc. Williams *v.* Heinze, Warden. C. A. 9th Cir. Certiorari denied.

No. 166, Misc. Vesay *v.* United States. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Acting Solicitor General Spritzer* for the United States.

No. 167, Misc. Williams *v.* Levin, U. S. District Judge. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Acting Solicitor General Spritzer* for respondent.

No. 170, Misc. Miguel *v.* United States. C. A. 2d Cir. Certiorari denied. *Rudolph Lion Zalowitz* and *Frederic A. Johnson* for petitioner. *Solicitor General Cox, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Ronald L. Gainer* for the United States. Reported below: 340 F. 2d 812.

No. 173, Misc. Rhodes *v.* New York. Ct. App. N. Y. Certiorari denied. Petitioner *pro se*. *Benj. J. Jacobson* for respondent.

No. 178, Misc. Walker *v.* United States. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Marshall Tamor Golding* for the United States. Reported below: 342 F. 2d 22.

No. 181, Misc. Johnson *v.* Pennsylvania et al. C. A. 3d Cir. Certiorari denied.

No. 184, Misc. Olguin *v.* California. Dist. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 180, Misc. **Herman** *v.* **United States.** C. A. 5th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox* for the United States.

No. 186, Misc. **Budner** *v.* **New York.** Ct. App. N. Y. Certiorari denied. *Harry Krauss* for petitioner. *Frank S. Hogan* and *H. Richard Uviller* for respondent. Reported below: 15 N. Y. 2d 253, 206 N. E. 2d 171.

No. 188, Misc. **Richter** *v.* **Minnesota.** Sup. Ct. Minn. Certiorari denied. Reported below: 270 Minn. 307, 133 N. W. 2d 537.

No. 189, Misc. **Sanchez** *v.* **United States.** C. A. 5th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox* for the United States. Reported below: 341 F. 2d 565.

No. 190, Misc. **Wilson** *v.* **United States.** C. A. 2d Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 342 F. 2d 782.

No. 192, Misc. **Byers** *v.* **Crouse, Warden.** C. A. 10th Cir. Certiorari denied. Reported below: 339 F. 2d 550.

No. 193, Misc. **Kanton** *v.* **United States.** C. A. 7th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox* for the United States. Reported below: 345 F. 2d 427.

No. 198, Misc. **Smith** *v.* **Industrial Accident Commission of California et al.** C. A. 9th Cir. Certiorari denied.

No. 191, Misc. CROSSLEY *v.* TAHASH, WARDEN. Sup. Ct. Minn. Certiorari denied.

No. 199, Misc. KERNER *v.* GARDNER, SECRETARY OF HEALTH, EDUCATION AND WELFARE. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for respondent. Reported below: 340 F. 2d 736.

No. 200, Misc. HALEY, ADMINISTRATRIX *v.* BALTIMORE & OHIO RAILROAD CO. ET AL. C. A. 7th Cir. Certiorari denied. *Maurice R. Kraines* for petitioner. *John L. Rogers, Jr.*, for respondents. Reported below: 341 F. 2d 732.

No. 208, Misc. PHEASTER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 209, Misc. SMITH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Orville A. Harlan* for petitioner. *Solicitor General Cox, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 343 F. 2d 539.

No. 210, Misc. MOORE *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 214, Misc. SAWYER *v.* RHAY, PENITENTIARY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied. Reported below: 340 F. 2d 990.

No. 215, Misc. WITHERSPOON *v.* PATE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 216, Misc. GRIMBLE *v.* BROWN, ADMINISTRATOR, ET AL. Sup. Ct. La. Certiorari denied. Reported below: 247 La. 376, 171 So. 2d 653.

No. 218, Misc. VEGA ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 1st Cir. Certiorari denied. *Ginoris Vizcarra* for petitioners. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 341 F. 2d 576.

No. 220, Misc. WHALEM *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se. Acting Solicitor General Spritzer, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 120 U. S. App. D. C. 331, 346 F. 2d 812.

No. 227, Misc. LEVY *v.* UNITED STATES. Ct. Cl. Certiorari denied. Petitioner *pro se. Solicitor General Cox* for the United States. Reported below: 169 Ct. Cl. 1020.

No. 228, Misc. OLIVER *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. *Maurice R. Woulfe* for petitioner. Reported below: 247 La. 729, 174 So. 2d 509.

No. 229, Misc. GLOVER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States.

No. 230, Misc. FAIR *v.* BRYANT, GOVERNOR OF FLORIDA. Sup. Ct. Fla. Certiorari denied.

No. 235, Misc. LUCAS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 343 F. 2d 1.

No. 236, Misc. FOSTER *v.* PARKER ET AL. C. A. 9th Cir. Certiorari denied.

No. 237, Misc. LAKE *v.* CAMERON, HOSPITAL SUPERINTENDENT. C. A. D. C. Cir. Certiorari denied.

No. 238, Misc. PETERS *v.* COX, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 341 F. 2d 575.

No. 239, Misc. HOWARD *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 26 Wis. 2d 652, 133 N. W. 2d 284.

No. 240, Misc. DAWSON *v.* CITY COUNCIL OF BUTTE, MONTANA, ET AL. C. A. 9th Cir. Certiorari denied. *Joseph P. Monaghan* for petitioner. *John H. Risken* for respondent Herweg.

No. 241, Misc. FRACE *v.* RUSSELL, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. Reported below: 341 F. 2d 901.

No. 242, Misc. McCLENNY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 346 F. 2d 125.

No. 243, Misc. AUTH *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied.

No. 244, Misc. WHITE *v.* WILSON, WARDEN. Super. Ct. Cal., County of Marin. Certiorari denied.

No. 247, Misc. BOWERS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Joseph H. Davis* for petitioner. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Daniel H. Benson* for the United States. Reported below: 344 F. 2d 124.

No. 246, Misc. BENVENISTE *v.* DENNO, WARDEN. C. A. 2d Cir. Certiorari denied. *Frances Kahn* for petitioner. *Louis J. Lefkowitz,* Attorney General of New York, and *Mortimer Sattler,* Assistant Attorney General, for respondent.

No. 250, Misc. STEVENSON *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Petitioner *pro se. Benj. J. Jacobson* for respondent.

No. 253, Misc. WILSON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Joel E. Hoffman* and *Monroe H. Freedman* for petitioner. *Solicitor General Cox, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 120 U. S. App. D. C. 72, 344 F. 2d 166.

No. 259, Misc. LEPISCOPO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Petitioner *pro se. Acting Solicitor General Spritzer, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 343 F. 2d 474.

No. 261, Misc. SHOBE *v.* HEINZE, WARDEN, ET AL. Sup. Ct. Cal. Certiorari denied.

No. 262, Misc. NAUTON *v.* CALIFORNIA. Dist. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 264, Misc. STILTNER *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied.

No. 267, Misc. HARRIS *v.* PATE, WARDEN. Sup. Ct. Ill. Certiorari denied.

No. 270, Misc. CREASON *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied.

No. 271, Misc. **Swanner** *v.* **Thomas, Warden, et al.** Ct. App. Ky. Certiorari denied.

No. 275, Misc. **D'Antonio** *v.* **New York.** Ct. App. N. Y. Certiorari denied. Petitioner *pro se. Frank S. Hogan* for respondent.

No. 277, Misc. **Dash** *v.* **LaVallee, Warden.** Ct. App. N. Y. Certiorari denied.

No. 280, Misc. **Veney** *v.* **United States.** C. A. D. C. Cir. Certiorari denied. Petitioner *pro se. Acting Solicitor General Spritzer, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 120 U. S. App. D. C. 157, 344 F. 2d 542.

No. 282, Misc. **Fernandez** *v.* **Wilson, Warden, et al.** C. A. 9th Cir. Certiorari denied.

No. 284, Misc. **Wood** *v.* **Conneaut Lake Park, Inc.** Sup. Ct. Pa. Certiorari denied. *George S. Goldstein* for petitioner. *Stuart A. Culbertson* for respondent. Reported below: 417 Pa. 58, 209 A. 2d 268.

No. 285, Misc. **Smith** *v.* **LaVallee, Warden.** C. A. 2d Cir. Certiorari denied.

No. 298, Misc. **Thacker** *v.* **Ward Markham Co.** Sup. Ct. N. C. Certiorari denied. Petitioner *pro se. John H. Anderson* and *Willis Smith, Jr.,* for respondent. Reported below: 263 N. C. 594, 140 S. E. 2d 23.

No. 291, Misc. **Byrd** *v.* **Oregon.** Sup. Ct. Ore. Certiorari denied. Petitioner *pro se. George Van Hoomissen* for respondent. Reported below: 240 Ore. 159, 400 P. 2d 522.

No. 286, Misc. CATENA *v.* GENNETTI, TRUSTEE. C. A. 3d Cir. Certiorari denied. Petitioner *pro se*. *Pace Reich* for respondent.

No. 294, Misc. LYONS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 296, Misc. GAINES *v.* UNITED STATES. Ct. Cl. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 301, Misc. PASSANTE *v.* HEROLD, STATE HOSPITAL DIRECTOR. C. A. 2d Cir. Certiorari denied.

No. 302, Misc. MARTINEZ *v.* COLORADO. Sup. Ct. Colo. Certiorari denied. Reported below: — Colo. —, 399 P. 2d 415.

No. 304, Misc. ROOT *v.* CUNNINGHAM, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied. Reported below: 344 F. 2d 1.

No. 305, Misc. HARRIS *v.* BRUZEE ET AL. C. A. D. C. Cir. Certiorari denied.

No. 307, Misc. DAVIS *v.* WILSON, WARDEN, ET AL. Sup. Ct. Cal. Certiorari denied.

No. 312, Misc. DOWNS *v.* CROUSE, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 313, Misc. SIMMONS *v.* OSWALD ET AL. C. A. 2d Cir. Certiorari denied.

No. 316, Misc. CRESWELL *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. *D. B. Mauzy* for petitioner. Reported below: 387 S. W. 2d 887.

No. 322, Misc. **Harper** *v.* **Florida.** Sup. Ct. Fla. Certiorari denied.

No. 325, Misc. **Thompson** *v.* **Michigan.** Sup. Ct. Mich. Certiorari denied.

No. 326, Misc. **Ross** *v.* **New York.** C. A. 2d Cir. Certiorari denied. Reported below: 341 F. 2d 823.

No. 328, Misc. **Oksten** *v.* **Florida.** Sup. Ct. Fla. Certiorari denied.

No. 333, Misc. **Young** *v.* **United States.** C. A. 8th Cir. Certiorari denied. *John Raeburn Green* for petitioner. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 344 F. 2d 1006.

No. 334, Misc. **Runnels** *v.* **Rhay, Penitentiary Superintendent.** Sup. Ct. Wash. Certiorari denied. *Francis Conklin* for petitioner.

No. 344, Misc. **Canady** *v.* **Wilkins, Warden.** C. A. 2d Cir. Certiorari denied.

No. 347, Misc. **Hayes** *v.* **LaVallee, Warden.** C. A. 2d Cir. Certiorari denied.

No. 351, Misc. **Bund** *v.* **LaVallee, Warden, et al.** C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Frank S. Hogan* and *Harold Roland Shapiro* for respondents. Reported below: 344 F. 2d 313.

No. 356, Misc. **Atkinson et al.** *v.* **United States.** C. A. 8th Cir. Certiorari denied. *Kenneth K. Simon* for petitioners. *Solicitor General Cox* for the United States. Reported below: 344 F. 2d 97.

No. 340, Misc. **Bradford** *v.* **Commissioner of Internal Revenue.** C. A. 2d Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Cox* for respondent.

No. 352, Misc. **Schultz** *v.* **Mullins, Warden, et al.** C. A. 5th Cir. Certiorari denied.

No. 355, Misc. **Bruce** *v.* **Pennsylvania.** C. A. 3d Cir. Certiorari denied.

No. 361, Misc. **Wolenski** *v.* **Sweney, Judge.** C. A. 3d Cir. Certiorari denied.

No. 364, Misc. **Strickland** *v.* **Myers, Correctional Superintendent.** C. A. 3d Cir. Certiorari denied.

No. 365, Misc. **Lluveras** *v.* **New York.** Sup. Ct. N. Y., N. Y. County. Certiorari denied.

No. 371, Misc. **Fletcher** *v.* **Beto, Corrections Director.** Ct. Crim. App. Tex. Certiorari denied. *William E. Gray* for petitioner.

No. 374, Misc. **Hanovich** *v.* **Maxwell, Warden.** C. A. 6th Cir. Certiorari denied. *Irving Harris* for petitioner. Reported below: 342 F. 2d 161.

No. 376, Misc. **Holland** *v.* **Gladden, Warden.** C. A. 9th Cir. Certiorari denied.

No. 377, Misc. **Farrant** *v.* **Bennett, Warden.** C. A. 8th Cir. Certiorari denied. Reported below: 347 F. 2d 390.

No. 379, Misc. **Talbert** *v.* **Kansas.** Sup. Ct. Kan. Certiorari denied. Reported below: 195 Kan. 149, 402 P. 2d 810.

No. 372, Misc. Bent *v.* United States. C. A. 8th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox* for the United States. Reported below: 340 F. 2d 703.

No. 380, Misc. Seymore *v.* New York. Ct. App. N. Y. Certiorari denied. Petitioner *pro se. Louis J. Lefkowitz,* Attorney General of New York, *Paxton Blair,* Solicitor General, and *Winifred C. Stanley,* Assistant Attorney General, for respondent.

No. 381, Misc. Olivo *v.* Fay, Warden. C. A. 2d Cir. Certiorari denied.

No. 382, Misc. Wellington *v.* Florida. Sup. Ct. Fla. Certiorari denied.

No. 383, Misc. Keys *v.* United States. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se. Acting Solicitor General Spritzer, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 120 U. S. App. D. C. 343, 346 F. 2d 824.

No. 385, Misc. Swanson *v.* Reincke, Warden. C. A. 2d Cir. Certiorari denied. Petitioner *pro se. John D. LaBelle* for respondent. Reported below: 344 F. 2d 260.

No. 398, Misc. Cruz *v.* Colorado. Sup. Ct. Colo. Certiorari denied. Petitioner *pro se. Duke W. Dunbar,* Attorney General of Colorado, *Frank E. Hickey,* Deputy Attorney General, and *James F. Pamp,* Assistant Attorney General, for respondent. Reported below: — Colo. —, 401 P. 2d 830.

No. 402, Misc. Fjellhammer *v.* United States et al. C. A. 9th Cir. Certiorari denied. Petitioner *pro se. Acting Solicitor General Spritzer* for the United States.

No. 395, Misc. GOLENBOCK *v.* WALLACK, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 401, Misc. MUZA *v.* CALIFORNIA ADULT AUTHORITY ET AL. Sup. Ct. Cal. Certiorari denied.

No. 404, Misc. SALZANO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se. Acting Solicitor General Spritzer* for the United States.

No. 405, Misc. DI SILVESTRO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Joseph W. Di Silvestro,* petitioner, *pro se. Acting Solicitor General Spritzer, Assistant Attorney General Douglas* and *Morton Hollander* for the United States.

No. 408, Misc. SALGADO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Joseph I. Stone* for petitioner. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 347 F. 2d 216.

No. 409, Misc. JOHNSON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se. Acting Solicitor General Spritzer* for the United States.

No. 417, Misc. BATCHELOR *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Carl L. Shipley* and *Thomas A. Ziebarth* for petitioner. *Acting Solicitor General Spritzer* for the United States. Reported below: 169 Ct. Cl. 180.

No. 418, Misc. KRENNRICH *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Carl L. Shipley, Thomas A. Ziebarth* and *Samuel Resnicoff* for petitioner. *Acting Solicitor General Spritzer* for the United States. Reported below: 169 Ct. Cl. 6, 340 F. 2d 653.

No. 426, Misc. **Warriner *v.* Fink et al.** C. A. 5th Cir. Certiorari denied. Petitioner *pro se.* *Irving B. Levenson* for respondents.

No. 434, Misc. **Schatz *v.* Gardner, Secretary of Health, Education and Welfare.** C. A. 2d Cir. Certiorari denied. *J. Stanley Shaw* for petitioner. *Acting Solicitor General Spritzer* for respondent. Reported below: 346 F. 2d 685.

No. 444, Misc. **White *v.* United States.** C. A. 4th Cir. Certiorari denied. Petitioner *pro se.* *Acting Solicitor General Spritzer* for the United States. Reported below: 342 F. 2d 379.

No. 445, Misc. **Choy *v.* United States.** C. A. 9th Cir. Certiorari denied. Petitioner *pro se.* *Acting Solicitor General Spritzer, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 344 F. 2d 126.

No. 463, Misc. **Pheribo *v.* United States.** C. A. 2d Cir. Certiorari denied. Petitioner *pro se.* *Acting Solicitor General Spritzer, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 346 F. 2d 559.

No. 29, Misc. **McFadden *v.* Illinois.** Sup. Ct. Ill. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. Petitioner *pro se.* *William G. Clark,* Attorney General of Illinois, and *Richard A. Michael,* Assistant Attorney General, for respondent. Reported below: 32 Ill. 2d 101, 203 N. E. 2d 888.

No. 103, Misc. **Davis *v.* Ohio.** Sup. Ct. Ohio. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted.

No. 217, Misc. JACKSON *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 219, Misc. HUGHES ET AL. *v.* KROPP, WARDEN. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Petitioners *pro se.* *Frank J. Kelley,* Attorney General of Michigan, *Luke Quinn,* Assistant Attorney General, and *Robert A. Derengoski,* Solicitor General, for respondent.

No. 254, Misc. TUTTLE *v.* UTAH. Sup. Ct. Utah. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *George H. Searle* for petitioner. *Phil L. Hansen,* Attorney General of Utah, and *Ronald N. Boyce,* Assistant Attorney General, for respondent. Reported below: 16 Utah 2d 288, 399 P. 2d 580.

No. 90, Misc. WHALEY *v.* CAVANAUGH ET AL. C. A. 9th Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 341 F. 2d 295.

No. 141, Misc. LEWIS *v.* ADERHOLDT ET AL. C. A. D. C. Cir. Motion of National Capital Area Civil Liberties Union for leave to file brief, as *amicus curiae,* granted. Certiorari denied. *Philip Shinberg* for petitioner. *Chester H. Gray, Milton D. Korman* and *Hubert B. Pair* for Aderholdt, and *Thomas A. Flannery* and *Stephen A. Trimble* for Washington Terminal Co., respondents. *Monroe H. Freedman* for National Capital Area Civil Liberties Union, as *amicus curiae,* in support of the petition.

Rehearing Denied.

No. 86, October Term, 1964. ZEMEL *v.* RUSK, SECRETARY OF STATE, ET AL., 381 U. S. 1;

No. 245, October Term, 1964. WATERMAN STEAMSHIP CORP. *v.* UNITED STATES, 381 U. S. 252;

No. 246, October Term, 1964. NATIONAL BULK CARRIERS, INC. *v.* UNITED STATES, 381 U. S. 933;

No. 292, October Term, 1964. ATLANTIC REFINING CO. *v.* FEDERAL TRADE COMMISSION, 381 U. S. 357;

No. 296, October Term, 1964. GOODYEAR TIRE & RUBBER CO. *v.* FEDERAL TRADE COMMISSION, 381 U. S. 357;

No. 347, October Term, 1964. JABEN *v.* UNITED STATES, 381 U. S. 214;

No. 832, October Term, 1964. AVGIKOS *v.* LOUISIANA, 381 U. S. 924;

No. 972, October Term, 1964. HOLLAND FURNACE CO. *v.* SCHNACKENBERG, U. S. CIRCUIT JUDGE, ET AL., 381 U. S. 924;

No. 997, October Term, 1964. STROLLO *v.* UNITED STATES, 381 U. S. 912;

No. 1011, October Term, 1964. SERMAN *v.* UNITED STATES, 381 U. S. 912;

No. 1017, October Term, 1964. INTERLAKE STEAMSHIP CO. *v.* NIELSEN ET AL., 381 U. S. 934;

No. 1053, October Term, 1964. RANDALL ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE, 381 U. S. 935;

No. 1056, October Term, 1964. TJONAMAN *v.* A/S GLITTRE ET AL., 381 U. S. 925;

No. 1067, October Term, 1964. W. M. R. WATCH CASE CORP. ET AL. *v.* FEDERAL TRADE COMMISSION, 381 U. S. 936;

No. 1106, October Term, 1964. RATKE ET AL. *v.* UNITED STATES, 381 U. S. 939; and

No. 513, Misc., October Term, 1964. CRAWFORD *v.* BANNAN, WARDEN, 381 U. S. 955. Petitions for rehearing denied. MR. JUSTICE FORTAS took no part in the consideration or decision of these petitions.

No. 612, Misc., October Term, 1964. BERMAN *v.* FAY, WARDEN, 381 U. S. 955;

No. 657, Misc., October Term, 1964. GRAY *v.* UNITED STATES, 381 U. S. 926;

No. 730, Misc., October Term, 1964. VALCARCEL *v.* UNITED STATES, 381 U. S. 926;

No. 743, Misc., October Term, 1964. LLOYD *v.* UNITED STATES, 381 U. S. 952;

No. 890, Misc., October Term, 1964. CASTLE *v.* UNITED STATES, 381 U. S. 953;

No. 998, Misc., October Term, 1964. WELLS *v.* UNITED STATES, 381 U. S. 927;

No. 1047, Misc., October Term, 1964. GOLDBERG *v.* OFFICE EMPLOYES INTERNATIONAL UNION, LOCAL 153, ET AL., 381 U. S. 939;

No. 1055, Misc., October Term, 1964. HILBRICH *v.* UNITED STATES, 381 U. S. 941;

No. 1159, Misc., October Term, 1964. USELDING *v.* UNITED STATES, 381 U. S. 941;

No. 1058, Misc., October Term, 1964. HALYSHYN *v.* UNITED STATES, 381 U. S. 928;

No. 1117, Misc., October Term, 1964. McLEOD *v.* OHIO, 381 U. S. 356;

No. 1118, Misc., October Term, 1964. GUNSTON *v.* UNITED STATES, 381 U. S. 930;

No. 1122, Misc., October Term, 1964. CLARK *v.* PAYNE, 381 U. S. 943;

No. 1130, Misc., October Term, 1964. NELMS *v.* UNITED STATES, 381 U. S. 943;

No. 1150 Misc., October Term, 1964. MACFADDEN *v.* HEINZE, WARDEN, ET AL., 381 U. S. 944; and

No. 1237, Misc., October Term, 1964. STEWART *v.* MICHIGAN ET AL., 381 U. S. 931. Petitions for rehearing denied. MR. JUSTICE FORTAS took no part in the consideration or decision of these petitions.

No. 120, October Term, 1964. Gottesman et al. *v.* General Motors Corp. et al., 379 U. S. 882, 940. Motion for leave to file second petition for rehearing denied. Mr. Justice Harlan and Mr. Justice Fortas took no part in the consideration or decision of this motion.

No. 256, October Term, 1964. Estes *v.* Texas, 381 U. S. 532. Motion for leave to file petition for rehearing denied. Mr. Justice Fortas took no part in the consideration or decision of this motion.

No. 580, Misc., October Term, 1964. Hall *v.* Pinto, Prison Superintendent, 381 U. S. 930;

No. 968, Misc., October Term, 1964. Walker *v.* Superior Court of California, City and County of San Francisco, et al., 381 U. S. 932; and

No. 1106, Misc., October Term, 1964. McIntosh *v.* United States, 381 U. S. 947. Petitions for rehearing denied. The Chief Justice and Mr. Justice Fortas took no part in the consideration or decision of these petitions.

October 13, 1965.

Dismissal Under Rule 60.

No. 586, Misc. Thomas *v.* Davis, Clerk of the Supreme Court of the United States. On motion for leave to file petition for writ of mandamus. Dismissed pursuant to Rule 60 of the Rules of this Court.

October 18, 1965.

Assignment Order.

An order of The Chief Justice designating and assigning Mr. Justice Reed (retired) to perform judicial duties in the United States Court of Claims beginning

November 1, 1965, and ending June 30, 1966, and for such further time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

Miscellaneous Orders.

No. 14, Original. LOUISIANA *v.* MISSISSIPPI ET AL. The case is set for argument on the Report of the Special Master and the exceptions thereto. Two hours are allotted for oral argument. [For earlier orders herein, see 375 U. S. 803, 950; 377 U. S. 901; 381 U. S. 947.]

No. 345, October Term, 1964. MARYLAND, FOR THE USE OF LEVIN, ET AL. *v.* UNITED STATES, 381 U. S. 41. The respondent is requested to file, within 20 days, a response to the petition for rehearing limited to the question as to whether this case should be remanded to the District Court for further proceedings with respect to the unresolved issues tendered in the petitioners' bill of complaint. MR. JUSTICE FORTAS took no part in the consideration of this petition. *Theodore E. Wolcott* on the petition for rehearing.

No. 57. HAZELTINE RESEARCH, INC., ET AL. *v.* BRENNER, COMMISSIONER OF PATENTS. C. A. D. C. Cir. (Certiorari granted, 380 U. S. 960.) Motion of Irwin M. Aisenberg for leave to file brief, as *amicus curiae*, granted. MR. JUSTICE FORTAS took no part in the consideration or decision of this motion. *Irwin M. Aisenberg* on the motion to file brief, as *amicus curiae*, urging reversal.

No. 575, Misc. EDWARDS *v.* WEAKLEY, REFORMATORY SUPERINTENDENT. Motion for leave to file petition for writ of habeas corpus denied.

No. 256, Misc. Ellhamer *v.* California. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for writ of certiorari, certiorari is denied.

Probable Jurisdiction Noted.

No. 396. DeGregory *v.* Attorney General of New Hampshire. Appeal from Sup. Ct. N. H. Probable jurisdiction noted. *Howard S. Whiteside* for appellant. *William Maynard,* Attorney General of New Hampshire, *R. Peter Shapiro,* Assistant Attorney General, and *Joseph F. Gall,* Special Assistant Attorney General, for appellee. Reported below: 106 N. H. 262, 209 A. 2d 712.

Certiorari Granted. (See No. 919, Oct. Term, 1961, *ante,* p. 25; No. 123, *ante,* p. 32; and No. 23, Misc., *ante,* p. 36.)

Certiorari Denied. (See also No. 281, *ante,* p. 39; and No. 256, Misc., *supra.*)

No. 211. Metromedia, Inc. *v.* American Society of Composers, Authors & Publishers et al. C. A. 2d Cir. Certiorari denied. *Robert A. Dreyer* and *George A. Katz* for petitioner. *Simon H. Rifkind, Herman Finkelstein* and *Jay H. Topkis* for the American Society of Composers, Authors & Publishers, and *Acting Solicitor General Spritzer, Assistant Attorney General Turner, Lionel Kestenbaum* and *I. Daniel Stewart, Jr.,* for the United States, respondents. Reported below: 341 F. 2d 1003.

No. 336. DeLong Corp. *v.* Oregon State Highway Commission et al. C. A. 9th Cir. Certiorari denied. *Bert B. Rand, Hans A. Nathan* and *George W. Mead* for petitioner. *Robert Y. Thornton,* Attorney General of Oregon, and *George E. Rohde, Alan H. Johansen, J. Robert Patterson* and *Frank C. McKinney,* Assistant Attorneys General, for respondents. Reported below: 343 F. 2d 911.

No. 349. SABENA BELGIAN WORLD AIRWAYS (SOCIETE ANONYME BELGE D'EXPLOITATION DE LA NAVI[G]ATION AERIENNE) *v.* LEROY, ADMINISTRATOR. C. A. 2d Cir. Certiorari denied. *George Warner Clark, John D. Calamari* and *Martin Fogelman* for petitioner. *George W. Herz* for respondent. Reported below: 344 F. 2d 266.

No. 367. SKAHILL, ADMINISTRATRIX *v.* CAPITAL AIRLINES, INC., ET AL. C. A. 2d Cir. Certiorari denied. *Augustine P. Turnbull* for petitioner. *William J. Junkerman* for respondents.

No. 392. STAGER *v.* FLORIDA EAST COAST RAILWAY CO. Sup. Ct. Fla. and/or Dist. Ct. App. Fla., 3d Dist. Certiorari denied. *B. Nathaniel Richter* for petitioner. *George C. Bolles* for respondent. Reported below: 163 So. 2d 15.

No. 399. SMITH, ADMINISTRATRIX, ET AL. *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. *Marvin Schwartz* and *Calvin W. Breit* for petitioners. *Solicitor General Marshall, Assistant Attorney General Douglas, David L. Rose* and *Robert V. Zener* for respondents. *Louis R. Harolds* for the American Trial Lawyers Association, as *amicus curiae,* in support of the petition. Reported below: 346 F. 2d 449.

No. 400. OWENS ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Sam Adam* for petitioners. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 346 F. 2d 329.

No. 402. DEMPSTER BROTHERS, INC. *v.* COHN, TRUSTEE IN BANKRUPTCY. C. A. 7th Cir. Certiorari denied. *John H. Wessel* for petitioner. *Irvin B. Charne* for respondent. Reported below: 343 F. 2d 527.

No. 408. Janigan *v.* Taylor et al. C. A. 1st Cir. Certiorari denied. *Matthew Brown* for petitioner. *Charles C. Cabot, Jr.,* for respondents. Reported below: 344 F. 2d 781.

No. 410. Trailways of New England, Inc. *v.* Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America, AFL-CIO, Division 1318. C. A. 1st Cir. Certiorari denied. *Morris J. Levin, Betty Southard Murphy* and *Richard R. Paradise* for petitioner. *Earle W. Putnam* for respondent. Reported below: 343 F. 2d 815.

No. 391. Railway Express Agency, Inc. *v.* Civil Aeronautics Board et al. C. A. D. C. Cir. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. Mr. Justice Fortas took no part in the consideration or decision of this petition. *William Q. Keenan* and *John E. Powell* for petitioner. *Solicitor General Marshall, Assistant Attorney General Turner, Lionel Kestenbaum, Gerald Kadish, O. D. Ozment* and *Robert L. Toomey* for the Civil Aeronautics Board, and *Alfred V. J. Prather, Warren E. Baker* and *Robert L. Stern* for American Airlines, Inc., et al., respondents. Reported below: 120 U. S. App. D. C. 228, 345 F. 2d 445.

No. 43, Misc. Lott *v.* Michigan et al. Sup. Ct. Mich. Certiorari denied. Petitioner *pro se.* *Frank J. Kelley,* Attorney General of Michigan, for respondents.

No. 130, Misc. Sturgis *v.* United States. C. A. 3d Cir. Certiorari denied. *Herman I. Pollock* for petitioner. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 342 F. 2d 328.

No. 176, Misc. **Smith** *v.* **United States.** C. A. 5th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Daniel H. Benson* for the United States. Reported below: 340 F. 2d 953.

No. 182, Misc. **Burke** *v.* **United States.** C. A. 7th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Vinson* and *Philip R. Monahan* for the United States. Reported below: 342 F. 2d 593.

No. 283, Misc. **Jackson** *v.* **United States.** C. A. 6th Cir. Certiorari denied. Petitioner *pro se. Acting Solicitor General Spritzer, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 344 F. 2d 922.

No. 314, Misc. **Anderson et al.** *v.* **United States.** C. A. 10th Cir. Certiorari denied. Petitioners *pro se. Acting Solicitor General Spritzer, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Jerome Feit* for the United States. Reported below: 344 F. 2d 792.

No. 335, Misc. **Colligan** *v.* **New York.** App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Petitioner *pro se. Frank S. Hogan* and *H. Richard Uviller* for respondent.

No. 358, Misc. **Schultz** *v.* **United States.** C. A. D. C. Cir. Certiorari denied. Petitioner *pro se. Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States.

No. 360, Misc. **Wright** *v.* **Blackwell, Warden.** C. A. 3d Cir. Certiorari denied. Petitioner *pro se. Acting Solicitor General Spritzer* for respondent.

No. 410, Misc. EVANS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States. Reported below: 346 F. 2d 512.

No. 413, Misc. HURLEY *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States.

No. 415, Misc. SHISOFF *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. *Frances Kahn* for petitioner. *Frank S. Hogan* and *Harold Roland Shapiro* for respondent.

No. 416, Misc. COLLINS *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 392 S. W. 2d 77.

No. 420, Misc. DAVIS *v.* CALIFORNIA ET AL. Sup. Ct. Cal. Certiorari denied.

No. 422, Misc. BLUNT *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 430, Misc. LOWTHER *v.* MAXWELL, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 347 F. 2d 941.

No. 431, Misc. KELLY *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 194 Kan. 258, 398 P. 2d 344.

No. 432, Misc. RICHARDSON *v.* HOLMAN, WARDEN. Sup. Ct. Ala. Certiorari denied.

No. 436, Misc. LONG *v.* PATE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 437, Misc. HENSLEY *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. *Joe F. Ramsey, Jr.*, for petitioner. Reported below: 388 S. W. 2d 424.

No. 438, Misc. SAULSBURY *v.* GREEN, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 347 F. 2d 828.

No. 439, Misc. GRIMES *v.* CROUSE, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 441, Misc. SCHERCK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se.* *Acting Solicitor General Spritzer* for the United States.

No. 443, Misc. WILSON *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 449, Misc. BELL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Marshall Patner* for petitioner. *Solicitor General Marshall* for the United States. Reported below: 345 F. 2d 354.

No. 464, Misc. WILLIAMS *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 465, Misc. RUARK *v.* COLORADO. Sup. Ct. Colo. Certiorari denied. Petitioner *pro se.* *Duke W. Dunbar,* Attorney General of Colorado, and *John P. Moore,* Assistant Attorney General, for respondent. Reported below: — Colo. —, 402 P. 2d 637.

No. 468, Misc. ARWINE *v.* BANNAN, WARDEN. C. A. 6th Cir. Certiorari denied. Petitioner *pro se.* *Frank J. Kelley,* Attorney General of Michigan, *Robert A. Derengoski,* Solicitor General, and *Luke Quinn,* Assistant Attorney General, for respondent. Reported below: 346 F. 2d 458.

No. 472, Misc. **Hargrove v. Brown, Administrator, et al.** Sup. Ct. La. Certiorari denied. Reported below: 247 La. 689, 174 So. 2d 120.

No. 473, Misc. **Dillard v. Bomar, Warden.** C. A. 6th Cir. Certiorari denied. Reported below: 342 F. 2d 789.

No. 474, Misc. **Paneitz v. Indiana.** Sup. Ct. Ind. Certiorari denied. Reported below: — Ind. —, 204 N. E. 2d 350.

No. 482, Misc. **Maritote, Administratrix, et al. v. Desilu Productions, Inc., et al.** C. A. 7th Cir. Certiorari denied. *Harold R. Gordon* for petitioners. *Newell S. Boardman* for respondents. Reported below: 345 F. 2d 418.

No. 485, Misc. **Finfer v. Cohen, Commissioner of Internal Revenue.** C. A. 2d Cir. Certiorari denied. *Edwin J. McDermott* for petitioner. *Solicitor General Marshall* for respondent. Reported below: 344 F. 2d 38.

No. 489, Misc. **Newcombe v. New York.** Ct. App. N. Y. Certiorari denied.

No. 503, Misc. **Davis v. Bomar, Warden.** C. A. 6th Cir. Certiorari denied. Reported below: 344 F. 2d 84.

No. 510, Misc. **Shively v. United States.** C. A. 5th Cir. Certiorari denied. *Vincent P. McCauley* for petitioner. *Solicitor General Marshall* for the United States. Reported below: 345 F. 2d 294.

No. 511, Misc. **In re Duarte.** C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Acting Solicitor General Spritzer* for the United States.

No. 224, Misc. SIMMONS *v.* UNION NEWS CO. C. A. 6th Cir. Certiorari denied. *Dee Edwards* for petitioner. *Frederic S. Glover, Jr.*, for respondent. Reported below: 341 F. 2d 531.

MR. JUSTICE BLACK, with whom THE CHIEF JUSTICE concurs, dissenting.

I would grant certiorari in this case. While petitioner presents other interesting and important questions concerning the right of trial by jury under the Seventh Amendment and concerning the power of a district court to grant summary judgment, my opinion is addressed to the question of whether the courts below were right in denying petitioner Simmons a court trial of her claim that she had been wrongfully discharged without "just cause" in violation of the collective bargaining agreement under which she was employed. The ground for refusing to let her try her case was that her employer and her union had agreed between themselves that her discharge was for "just cause." I think the courts below were wrong. The material facts upon which I base my conclusion are these:

Petitioner was one of about a dozen employees working at the lunch counter in respondent's restaurant in a railway station. For about a year prior to petitioner's discharge, profits at the lunch counter lagged behind those expected by respondent. Respondent suspected that this was due either to the mishandling or to the actual stealing of its funds or goods. The collective bargaining agreement provided that no employee should be discharged without "just cause" and that prospective discharges would be discussed by the employer and the union. Pursuant to the contract, the company's representative went to the union's representative to discuss what could be done in order to improve the profit situation at the lunch counter. The company representative suggested that all of the counter employees be discharged and others take their places. The union representative objected. After lengthy negotiations, however, a plan was agreed upon by the company and the union under which five of the employees would be immediately laid off for a two-week period. If at the end of the period, records indicated that there was a significant improvement in the company's business at the lunch counter, it was agreed that the five employees were to be discharged. The five were laid off including the petitioner and Gladys Hildreth.[1] When the company convinced the union that the lunch counter profits had increased during the period, the union agreed with respondent that the workers should be discharged permanently. Both petitioner and Miss Hildreth vigorously protested. They urged the union to carry their protest all the way up through the various stages of negotiations leading to arbitration. The union representative, however, refused to give any help to petitioner and Miss Hildreth. Then, petitioner, by herself, took the matter up with the company, endeavoring to settle it as a personal grievance of her own. The company refused to negotiate with petitioner in any way whatever, notwithstanding § 9 (a) of the National Labor Relations Act, as amended,[2] which states in part, "That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect." Petitioner, out of a job, then brought this action against the company for the alleged breach of contract in discharging her.

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[1] See *Union News Co.* v. *Hildreth,* 295 F. 2d 658; *Hildreth* v. *Union News Co.,* 315 F. 2d 548, certiorari denied, 375 U. S. 826.

[2] 61 Stat. 143, 29 U. S. C. § 159 (a) (1964 ed.).

Although this Court has gone very far in some of its cases with reference to the power of a collective bargaining union to process the personal grievances of its members, it has not yet gone so far as to say that where there is a personal grievance for breach of a collective bargaining agreement, the employee can be deprived of an independent judicial determination of the claim by an agreement between the union and the employer that no breach exists. But this is exactly what was done to petitioner and Miss Hildreth. Though I dissented in *Republic Steel Corp.* v. *Maddox,* 379 U. S. 650, I was, and still am of the belief that the majority opinion purported to preserve the right of an employee to sue his employer if his union refused to press his grievances. However, I fear that the decisions below in the *Hildreth* case and in this one go a long way toward effectively destroying whatever redress this Court left the individual employee in *Maddox.* The courts below refused to make their own determination of whether Miss Hildreth's and petitioner's discharges were made for "just cause." Instead, they allowed the employer's defense that "just cause" was simply what the employer and the union jointly wanted it to be. While we often say that nothing is decided by a denial of certiorari, all of us know that a denial of certiorari in this case, following the denial of certiorari in the *Hildreth* case, will undoubtedly lead people to believe, and I fear with cause, that this Court is now approving such a forfeiture of contractual claims of individual employees.

This case points up with great emphasis the kind of injustice that can occur to an individual employee when the employer and the union have such power over the employee's claim for breach of contract. Here no one has claimed from the beginning to the end of the *Hildreth* lawsuit or this lawsuit that either of these individuals was guilty of any kind of misconduct justifying her discharge. Each was one of twelve employees engaged in the operation of a lunch counter. In the *Hildreth* case respondent's supervisor testified that he had no knowledge that any of the employees discharged were in any way responsible for the lunch counter's unsuccessful operation. The manager of the lunch counter stated that he did not know of "one single thing" that Miss Hildreth had done to reduce the counter's profits. We must assume that had petitioner here been given an opportunity to try her case, the same facts would have appeared. Moreover, petitioner alleges that she was prepared to show that subsequent to her discharge, the office girl who counted the money received at the lunch counter was found to be embezzling those funds and was discharged for it. Miss Hildreth had worked for respondent for nine and one-half years, and petitioner for fifteen years, prior to their discharges. There is no evidence that respondent had ever been dissatisfied with their work before the company became disappointed with its lunch counter about a year prior to the discharges. Yet both were discharged for "just cause," as determined not by a court but by an agreement of the company and the union.

I would not construe the National Labor Relations Act as giving a union and an employer any such power over workers. In this case there has been no bargain made on behalf of all the workers represented by the union. Rather there has been a sacrifice of the rights of a group of employees based on the belief that some of them might possibly have been guilty of some kind of misconduct that would reduce the employer's profits. Fully recognizing the right of the collective bargaining representative to make a contract on the part of the workers for the future, I cannot believe that those who passed the Act intended to give the union the right to negotiate away alleged breaches of a contract claimed by individual employees.

The plain fact is that petitioner has lost her job, not because of any guilt on her part, but because there is a suspicion that some one of the group which was discharged was guilty of misconduct. The sum total of what has been done here is to abandon the fine, old American ideal that guilt is personal. Our system of jurisprudence should not tolerate imposing on the innocent punishment that should be laid on the guilty. If the construction of the labor law given by the courts below is to stand, it should be clearly and unequivocally announced by this Court so that Congress can, if it sees fit, consider this question and protect the just claims of employees from the joint power of employers and unions.

No. 513, Misc. HOLMES *v.* MYERS, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. Reported below: 347 F. 2d 234.

No. 520, Misc. CARTER ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Frederic A. Johnson* and *Rudolph Lion Zalowitz* for petitioners. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 347 F. 2d 220.

No. 528, Misc. FAIR *v.* CITY OF TAMPA ET AL. Sup. Ct. Fla. Certiorari denied.

No. 540, Misc. MILLER *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for respondent.

No. 357, Misc. PRICE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. MR. JUSTICE FORTAS took no part in the consideration or decision of this petition. *Dennis G. Lyons* for petitioner. *Acting Solicitor General Spritzer* for the United States. Reported below: 121 U. S. App. D. C. 62, 348 F. 2d 68.

No. 553, Misc. Lujan *v.* United States. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Acting Solicitor General Spritzer* for the United States. Reported below: 348 F. 2d 156.

Rehearing Denied.

No. 5, Original. United States *v.* California, 381 U. S. 139. Petition for rehearing denied. Mr. Justice Black and Mr. Justice Douglas are of the opinion that the rehearing should be granted. The Chief Justice, Mr. Justice Clark and Mr. Justice Fortas took no part in the consideration or decision of this petition.

October 25, 1965.

Miscellaneous Orders.

No. 23, Original. United States *v.* Alabama;
No. 24, Original. United States *v.* Mississippi; and
No. 25, Original. United States *v.* Louisiana. The motions to expedite consideration are granted and the defendants are directed to file responses to the motions for leave to file bills of complaint on or before November 10, 1965. *Attorney General Katzenbach, Solicitor General Marshall, Assistant Attorney General Doar, Ralph S. Spritzer* and *Louis F. Claiborne* on the motions.

No. 554, Misc. Johnson *v.* Maxwell, Warden. Motion for leave to file petition for writ of habeas corpus denied.

Certiorari Granted.

No. 120, Misc. Perry *v.* Commerce Loan Co. C. A. 6th Cir. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari granted. The case is transferred to the appellate docket. Reported below: 340 F. 2d 588.

No. 382. Pate, Warden *v.* Robinson. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* and petition for writ of certiorari granted. The parties are requested to brief and argue, in addition to the questions presented, the question whether any of the further proceedings contemplated in the opinion of the Court of Appeals should be conducted in the appropriate Illinois courts rather than in the District Court. *William G. Clark*, Attorney General of Illinois, and *Richard A. Michael* and *A. Zola Groves*, Assistant Attorneys General, for petitioner. Respondent *pro se*. Reported below: 345 F. 2d 691.

No. 331, Misc. Collier *v.* United States. Motion for leave to file petition for writ of mandamus denied. Treating the papers submitted as a petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit, certiorari is granted. Motion for leave to proceed *in forma pauperis* granted. The case is transferred to the appellate docket. Petitioner *pro se*. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Julia P. Cooper* for the United States.

Certiorari Denied. (See also No. 522, Misc., *ante*, p. 43; and No. 551, Misc., *ante*, p. 42.)

No. 414. Klebanow et al., Executors *v.* Chase Manhattan Bank et al. C. A. 2d Cir. Certiorari denied. *Max Freund* and *Abraham M. Glickman* for petitioners. *William Eldred Jackson* for respondents. Reported below: 343 F. 2d 726.

No. 427. Jesse *v.* Washington. Sup. Ct. Wash. Certiorari denied. Reported below: 65 Wash. 2d 510, 397 P. 2d 1018.

No. 419. Barnes *v.* Sind et al. C. A. 4th Cir. Certiorari denied. *Joseph L. Rauh, Jr., John Silard* and *Daniel H. Pollitt* for petitioner. *Morris D. Schwartz* and *Leon H. A. Pierson* for respondents. Reported below: 341 F. 2d 676; 347 F. 2d 324.

No. 421. Local 1291, International Longshoremen's Association, AFL–CIO *v.* National Labor Relations Board. C. A. 3d Cir. Certiorari denied. *Abraham E. Freedman* and *Martin J. Vigderman* for petitioner. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 345 F. 2d 4.

No. 426. Bain *v.* Nicodemus et al. C. A. D. C. Cir. Certiorari denied. *James E. Hogan* for petitioner. *J. Louis Monarch* for respondents. Reported below: 120 U. S. App. D. C. 116, 344 F. 2d 501.

No. 430. Chung Leung et al. *v.* Esperdy, District Director, Immigration and Naturalization Service. C. A. 2d Cir. Certiorari denied. *Abraham Lebenkoff* for petitioners. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson, L. Paul Winings* and *Charles Gordon* for respondent.

No. 418. Bumb, Trustee in Bankruptcy *v.* Hartwell Corp. C. A. 9th Cir. Certiorari denied. *Waller Taylor II* for petitioner. *John C. Gemmill* for respondent. Reported below: 345 F. 2d 453.

No. 431. Glick et al. *v.* Ballentine Produce, Inc. C. A. 8th Cir. Certiorari denied. *Elwyn L. Cady, Jr.,* for petitioners. *James W. Benjamin* for respondent. Reported below: 343 F. 2d 839.

No. 432. HOLMES ET AL. *v.* EDDY ET AL. C. A. 4th Cir. Certiorari denied. Petitioners *pro se*. *Solicitor General Marshall, Assistant Attorney General Douglas, Philip A. Loomis, Jr.,* and *Walter P. North* for Securities and Exchange Commission et al., respondents. Reported below: 341 F. 2d 477.

No. 433. SHAMROCK OIL & GAS CORP. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. *H. A. Berry* and *W. M. Sutton* for petitioner. *Solicitor General Marshall, Acting Assistant Attorney General Roberts, Melva M. Graney* and *Thomas L. Stapleton* for respondent. Reported below: 346 F. 2d 377.

No. 435. BERMAN, TRADING AS SCOTT CONSTRUCTION CO., ET AL. *v.* HERRICK ET AL., TRADING AS LEWIS TOWER BUILDING. C. A. 3d Cir. Certiorari denied. *Samuel Sacks* for petitioners. *Louis J. Goffman* for respondents. Reported below: 346 F. 2d 116.

No. 140. BLAU *v.* MAX FACTOR & CO. ET AL. C. A. 9th Cir. Motion of petitioner for leave to submit additional authority granted. Certiorari denied. *Morris J. Levy* and *Robert W. Kenny* for petitioner. *Carl J. Schuck* and *Wayne H. Knight* for Max Factor & Co., and *Frederic H. Sturdy* for Factor et al., respondents. Reported below: 342 F. 2d 304.

No. 500. HALPERN ET AL., DBA BURLINGTON BROADCASTING CO. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. *Morton H. Wilner* for petitioners. *J. Roger Wollenberg* for West Jersey Broadcasting Co., and *Arthur W. Scharfeld* for Giordano, respondents.

No. 204. MID-FLORIDA TELEVISION CORP. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Motion to use the record in No. 698, October Term, 1963, granted. Motion to direct the Federal Communications Commission and the Solicitor General to file a statement of their position denied. Certiorari denied. *Paul Dobin* for petitioner. *Edward P. Morgan* and *Edward S. O'Neill* for WORZ, Inc., respondent. Reported below: 120 U. S. App. D. C. 191, 345 F. 2d 85.

No. 413. POLLACK ET AL. *v.* COMMISSIONER OF PATENTS. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE FORTAS took no part in the consideration or decision of this petition. *Morris Lavine* for petitioners. *Solicitor General Marshall, Assistant Attorney General Douglas, Sherman L. Cohn* and *Robert V. Zener* for respondent. Reported below: 120 U. S. App. D. C. 318, 346 F. 2d 799.

No. 114, Misc. PHILLIPS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Marshall* for the United States.

No. 590. FLORIDA-GEORGIA TELEVISION CO., INC. *v.* FEDERAL COMMUNICATIONS COMMISSION; and

No. 678. JACKSONVILLE BROADCASTING CORP. *v.* FLORIDA-GEORGIA TELEVISION CO., INC. C. A. D. C. Cir. Motion of Jacksonville Broadcasting Corp. to be added as a party respondent in No. 590 denied. Certiorari denied. *Warner W. Gardner, Lawrence J. Latto, William H. Dempsey, Jr., Bernard Koteen, Alan Y. Naftalin* and *Richard F. Wolfson* for petitioner in No. 590. *Charles H. Murchison* for petitioner in No. 678. *William H. Dempsey, Jr.,* for respondent in No. 678. Reported below: 121 U. S. App. D. C. 69, 348 F. 2d 75.

No. 434. ANDERSON, GOVERNOR OF KANSAS, ET AL. *v.* HARRIS ET AL. Sup. Ct. Kan. Certiorari denied. MR. JUSTICE FORTAS took no part in the consideration or decision of this petition. *Robert C. Londerholm,* Attorney General of Kansas, and *Charles N. Henson, Jr.,* Assistant Attorney General, for petitioners. *William Y. Chalfant* for respondents. Reported below: 194 Kan. 302, 400 P. 2d 25.

No. 276, Misc. GONZALEZ *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Daniel H. Benson* for the United States.

No. 318, Misc. SANTOS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Petitioner *pro se. Solicitor General Marshall* for the United States.

No. 375, Misc. HUTCHERSON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Aloysius B. McCabe* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 120 U. S. App. D. C. 274, 345 F. 2d 964.

No. 423, Misc. PRATER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se. Solicitor General Marshall* for the United States.

No. 414, Misc. GRISHAM *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 344 F. 2d 689.

No. 394, Misc. BENNETT *v.* ADAMOWSKI ET AL. C. A. 7th Cir. Certiorari denied.

No. 452, Misc. CYRONNE-DE VIRGIN *v.* MISSOURI ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 341 F. 2d 568.

No. 461, Misc. CUMMINGS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se. Solicitor General Marshall* for the United States.

No. 477, Misc. GOLDSTEIN *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 65 Wash. 2d 901, 400 P. 2d 368.

No. 487, Misc. RISING *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied.

No. 508, Misc. GROZA *v.* LEMMON ET AL. Sup. Ct. Cal. Certiorari denied.

No. 527, Misc. CANTRELL *v.* MAXWELL, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied.

No. 530, Misc. BENNETT *v.* PATE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 531, Misc. SAYLORS *v.* RHAY, PENITENTIARY SUPERINTENDENT. Sup. Ct. Wash. Certiorari denied.

No. 535, Misc. ROLLINS *v.* HASKINS, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 348 F. 2d 454.

No. 545, Misc. FERNANDEZ *v.* KLINGER. C. A. 9th Cir. Certiorari denied. Reported below: 346 F. 2d 210.

No. 560, Misc. SMART *v.* HEINZE, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 347 F. 2d 114.

No. 561, Misc. RATHER *v.* MARYLAND. C. A. 4th Cir. Certiorari denied.

No. 565, Misc. BALES *v.* HEINZE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 578, Misc. TURPIN *v.* MAXWELL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 585, Misc. HADDAD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States. Reported below: 349 F. 2d 511.

No. 588, Misc. EDWARDS *v.* WARDEN, MARYLAND PENITENTIARY. Ct. App. Md. Certiorari denied. Reported below: 238 Md. 646, 210 A. 2d 526.

No. 2, Misc. MILNE *v.* MILNE. Ct. App. Md. Certiorari denied on the representation of the Attorney General of Maryland that there may be an adequate state remedy available to petitioner. Petitioner *pro se*. *Thomas B. Finan*, Attorney General of Maryland, and *Edward L. Blanton, Jr.*, Assistant Attorney General, filed a brief expressing the views of the State of Maryland.

No. 526, Misc. SNELL *v.* ALABAMA. Sup. Ct. Ala. Motion to strike brief of respondent denied. Certiorari denied. Petitioner *pro se*. *Richmond M. Flowers*, Attorney General of Alabama, and *Paul T. Gish, Jr.*, Assistant Attorney General, for respondent. Reported below: 278 Ala. 73, 175 So. 2d 766.

OCTOBER 29, 1965.

Dismissals Under Rule 60.

No. 89. JOINT COUNCIL 53, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, ET AL. *v.* MEYER ET AL.; and

No. 94. LOCAL 107, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, ET AL. *v.* MEYER ET AL. Sup. Ct. Pa. Petitions for writs of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. *Edward Davis* for petitioners in No. 89. *Richard H. Markowitz* for petitioners in No. 94. *Paul L. Jaffe* for respondents. Reported below: 416 Pa. 401, 206 A. 2d 382.

NOVEMBER 4, 1965.

Dismissal Under Rule 60.

No. 841, Misc. CEPHUS *v.* UNITED STATES. C. A. D. C. Cir. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. Reported below: 122 U. S. App. D. C. 187, 352 F. 2d 663.

NOVEMBER 5, 1965.

Miscellaneous Orders.

No. 23, Original. UNITED STATES *v.* ALABAMA;

No. 24, Original. UNITED STATES *v.* MISSISSIPPI; and

No. 25, Original. UNITED STATES *v.* LOUISIANA. The motions for leave to file bills of complaint are denied. *Attorney General Katzenbach, Solicitor General Marshall, Assistant Attorney General Doar, Ralph S. Spritzer* and *Louis F. Claiborne* for the United States. *Richmond M. Flowers*, Attorney General of Alabama, and *Gordon Madison*, Assistant Attorney General, for defendant in No. 23, Original. [For earlier order in these cases, see *ante*, p. 889.]

No. 22, Original. SOUTH CAROLINA *v.* KATZENBACH, ATTORNEY GENERAL OF THE UNITED STATES. The motion for leave to file a bill of complaint is granted. The defendant shall file his answer on or before November 20, 1965. The plaintiff shall file its brief on the merits on or before December 20, 1965. The defendant shall file his brief on the merits on or before January 5, 1966. The case is set for oral argument on Monday, January 17, 1966. Any State may submit a brief, *amicus curiae,* on or before December 20, 1965, and any such State desiring to participate in the oral argument, as *amicus curiae,* shall file with the Clerk of the Court a request for permission to do so on or before December 20, 1965. MR. JUSTICE BLACK, MR. JUSTICE HARLAN and MR. JUSTICE STEWART would deny the motion for leave to file the bill of complaint. *Daniel R. McLeod,* Attorney General of South Carolina, *David W. Robinson* and *David W. Robinson II* for plaintiff. *Solicitor General Marshall* for defendant.

NOVEMBER 8, 1965.

Order Appointing Librarian.

It is Ordered that Henry Charles Hallam, Jr., be, and he is hereby, appointed Librarian of this Court in the place of Miss Helen Newman, deceased.

Miscellaneous Orders.

No. 27. GUNTHER *v.* SAN DIEGO & ARIZONA EASTERN RAILWAY CO. C. A. 9th Cir. (Certiorari granted, 380 U. S. 905.) Motion of the Railway Labor Executives' Association for leave to file a brief, as *amicus curiae,* granted. *Clarence M. Mulholland, Edward J. Hickey, Jr.,* and *Richard R. Lyman* for the Railway Labor Executives' Association, as *amicus curiae,* urging reversal. *Waldron A. Gregory* and *William R. Denton* for respondent, in opposition.

No. 411. Marsh, Secretary of State of Nebraska, et al. *v.* Dworak et al. Appeal from D. C. Neb. Motion of appellants to defer consideration of the motion to dismiss and to defer filing brief in opposition granted. Mr. Justice Fortas took no part in the consideration or decision of this motion. *Clarence A. H. Meyer,* Attorney General of Nebraska, and *Richard H. Williams* and *Robert A. Nelson,* Assistant Attorneys General, for appellants. *August Ross* and *Robert E. O'Connor* for appellees.

No. 657. Brookhart *v.* Ohio. Sup. Ct. Ohio. (Certiorari granted, *ante,* p. 810.) Motion for the appointment of counsel granted, and it is ordered that *Lawrence Herman, Esquire,* and *Gerald A. Messerman, Esquire,* both of Columbus, Ohio, be, and they are hereby, appointed to serve as counsel for petitioner in this case.

No. 567, Misc. Smith *v.* Gagnon, Warden;
No. 652, Misc. Wells *v.* United States;
No. 653, Misc. Davis *v.* Kearney, Warden, et al.; and
No. 677, Misc. Trew *v.* Wainwright, Corrections Director. Motions for leave to file petitions for writs of habeas corpus denied.

No. 453, Misc. Bowens *v.* Alexander, Director, Bureau of Federal Prisons, et al. Motion for leave to file petition for writ of mandamus denied. Petitioner *pro se. Solicitor General Marshall, Assistant Attorney General Doar* and *David Rubin* for respondents.

No. 542, Misc. Moore *v.* Rodak. Motion for leave to file petition for writ of mandamus denied. Petitioner *pro se. Solicitor General Marshall* for respondent.

Probable Jurisdiction Noted.

No. 404. UNITED STATES *v.* PABST BREWING CO. ET AL. Appeal from D. C. E. D. Wis. Probable jurisdiction noted. *Solicitor General Cox, Assistant Attorney General Turner, Frank I. Goodman, Robert B. Hummel* and *Irwin A. Seibel* for the United States. *John T. Chadwell, Glenn W. McGee, David A. Nelson, Joseph R. Gray* and *Ray T. McCann* for appellee Pabst Brewing Co. Reported below: 233 F. Supp. 475.

No. 368. A BOOK NAMED "JOHN CLELAND'S MEMOIRS OF A WOMAN OF PLEASURE" *v.* ATTORNEY GENERAL OF MASSACHUSETTS. Appeal from Sup. Jud. Ct. Mass. Probable jurisdiction noted. The motion of the appellant to advance oral argument is granted and the case is set to follow No. 49. *Charles Rembar* for appellant. Reported below: 349 Mass. 69, 206 N. E. 2d 403.

Certiorari Granted. (See also No. 420, *ante,* p. 68; and No. 369, Misc., *ante,* p. 69.)

No. 487. MALAT ET UX. *v.* RIDDELL, DISTRICT DIRECTOR OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari granted. *George T. Altman* for petitioners. *Solicitor General Marshall, Acting Assistant Attorney General Roberts, Melva M. Graney* and *Carolyn R. Just* for respondent. Reported below: 347 F. 2d 23.

No. 440. UNITED STATES *v.* UTAH CONSTRUCTION & MINING CO. Ct. Cl. Certiorari granted. The case is set for oral argument immediately following No. 439. *Acting Solicitor General Spritzer, Assistant Attorney General Douglas, Morton Hollander* and *David L. Rose* for the United States. *Gardiner Johnson* and *Thomas E. Stanton, Jr.,* for respondent. Reported below: 168 Ct. Cl. 522, 339 F. 2d 606.

No. 439. UNITED STATES *v.* ANTHONY GRACE & SONS, INC. Ct. Cl. Certiorari granted. *Acting Solicitor General Spritzer, Assistant Attorney General Douglas, Morton Hollander* and *David L. Rose* for the United States. Reported below: 170 Ct. Cl. 688, 345 F. 2d 808.

Certiorari Denied. (See also No. 550, Misc., *ante,* p. 67.)

No. 372. MCCULLOUGH ET UX. *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Robert T. Molloy* and *George E. Bailey* for petitioners. *Solicitor General Marshall, Acting Assistant Attorney General Roberts* and *Philip R. Miller* for the United States. Reported below: 170 Ct. Cl. 1, 344 F. 2d 383.

No. 437. GOTTONE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Walter L. Gerash* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 345 F. 2d 165.

No. 441. DOWNING *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 348 F. 2d 594.

No. 444. SEVEN-UP CO. *v.* GET UP CORP. C. A. 6th Cir. Certiorari denied. *Beverly W. Pattishall* for petitioner. *Walter J. Halliday* for respondent. Reported below: 340 F. 2d 954.

No. 448. STERNFELS *v.* BOARD OF REGENTS OF UNIVERSITY OF STATE OF NEW YORK ET AL. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. *Kenneth Simon* for petitioner.

No. 446. SNC MANUFACTURING CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. D. C. Cir. Certiorari denied. *Walter S. Davis* for petitioner. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 122 U. S. App. D. C. 145, 352 F. 2d 361.

No. 450. VIOLET TRAPPING CO., INC. *v.* TENNESSEE GAS TRANSMISSION CO. Sup. Ct. La. Certiorari denied. *John W. Bryan, Jr.,* for petitioner. *Ernest A. Carrere, Jr., Clyde R. Brown* and *H. A. Messmore* for respondent. Reported below: 248 La. 49, 176 So. 2d 425.

No. 451. BOND *v.* TWIN LAKES RESERVOIR & CANAL CO. ET AL. Sup. Ct. Colo. Certiorari denied. *W. David McClain, Edwin A. Williams* and *Eugene A. Bond* for petitioner. *Eugene S. Hames* for respondents. Reported below: — Colo. —, 401 P. 2d 586.

No. 452. RIDGEWAY *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. *Lee Ward* for petitioner. *Bruce Bennett,* Attorney General of Arkansas, and *Beryl Anthony, Jr.,* Assistant Attorney General, for respondent. Reported below: 239 Ark. 377, 389 S. W. 2d 617.

No. 454. BOROUGH OF FORD CITY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *George P. Cheney, Jr.,* for petitioner. *Solicitor General Marshall, Assistant Attorney General Weisl, Roger P. Marquis* and *Howard O. Sigmond* for the United States. Reported below: 345 F. 2d 645.

No. 455. IN RE ANONYMOUS, AN ATTORNEY *v.* COORDINATING COMMITTEE ON DISCIPLINE. Ct. App. N. Y. Certiorari denied. *Leonard Feldman* for petitioner. *Angelo T. Cometa* for respondent.

No. 456. MURPHY *v.* LARKIN, CORPORATION COUNSEL, CITY OF NEW YORK, ET AL. Ct. App. N. Y. Certiorari denied. *Francis X. Tucker, Spencer Pinkham* and *Vernon Murphy, pro se,* for petitioner. *Leo A. Larkin, pro se,* and for other respondents.

No. 457. IVEY ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Joseph G. Bramberg* for petitioners. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 346 F. 2d 157.

No. 458. POLIKOFF *v.* LEVY ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. *Milton H. Cohen* for petitioner. *Nat M. Kahn* for respondents. Reported below: 55 Ill. App. 2d 229, 204 N. E. 2d 807.

No. 460. PALMER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *William F. Walsh* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Daniel H. Benson* for the United States. Reported below: 340 F. 2d 48.

No. 462. ZAMARONI *v.* PHILPOTT, DISTRICT DIRECTOR OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. *Stanley M. Rosenblum* and *Merle L. Silverstein* for petitioner. *Solicitor General Marshall, Acting Assistant Attorney General Roberts, Joseph M. Howard* and *Burton Berkley* for respondent. Reported below: 346 F. 2d 365.

No. 465. TILLAMOOK COUNTY CREAMERY ASSOCIATION *v.* TILLAMOOK CHEESE & DAIRY ASSOCIATION. C. A. 9th Cir. Certiorari denied. *J. Pierre Kolisch* and *Warren A. McMinimee* for petitioner. *Stephen W. Blore* for respondent. Reported below: 345 F. 2d 158.

No. 459. JOHNSON *v.* GOODYEAR TIRE & RUBBER CO. ET AL. C. A. 9th Cir. Certiorari denied.

No. 463. J. E. SCHECTER CORP. *v.* CARRIER CORP. ET AL. C. A. 2d Cir. Certiorari denied. *Chauncey H. Levy* for petitioner. *Herman N. Schwartz* for respondents. Reported below: 347 F. 2d 153.

No. 464. LLOYD A. FRY ROOFING CO. *v.* VOLASCO PRODUCTS CO. C. A. 6th Cir. Certiorari denied. *Burton Y. Weitzenfeld* for petitioner. *William C. Wilson* for respondent. Reported below: 346 F. 2d 661.

No. 466. LIPPI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Jacob W. Friedman* for petitioner. *Solicitor General Marshall, Acting Assistant Attorney General Roberts, Joseph M. Howard* and *John P. Burke* for the United States. Reported below: 347 F. 2d 33.

No. 467. BROWN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Daniel H. Greenberg* and *Marvin Margolis* for petitioner. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 348 F. 2d 661.

No. 468. COLSON CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 8th Cir. Certiorari denied. *James M. Reeves* for petitioner. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 347 F. 2d 128.

No. 469. LARGO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Max Cohen* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Philip R. Monahan* for the United States. Reported below: 346 F. 2d 253.

No. 470. WATWOOD *v.* MORRISON ET AL. C. A. D. C. Cir. Certiorari denied.

No. 472. ADDABBO ET AL. *v.* DONOVAN ET AL. Ct. App. N. Y. Certiorari denied. *Bernard Kessler* for petitioners. *Leo A. Larkin, Seymour B. Quel* and *Sidney P. Nadel* for respondents. Reported below: 16 N. Y. 2d 619, 209 N. E. 2d 112.

No. 473. ESTWING MANUFACTURING CO., INC. *v.* SINGER, GUARDIAN. Ct. App. N. Y. Certiorari denied. *Herbert Burstein* for petitioner. *Stephen E. Burgio* for respondent. Reported below: 15 N. Y. 2d 443, 209 N. E. 2d 68.

No. 475. GREAT LAKES CARBON CORP. *v.* CONTINENTAL OIL CO. ET AL. C. A. 5th Cir. Certiorari denied. *Earl Babcock, Wayne L. Benedict* and *S. W. Plauché, Jr.*, for petitioner. *Richard Russell Wolfe* and *Cullen R. Liskow* for respondents. Reported below: 345 F. 2d 175.

No. 476. UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, LOCAL 1780, ET AL. *v.* REYNOLDS ELECTRICAL & ENGINEERING CO., INC. Sup. Ct. Nev. Certiorari denied. *Morton Galane* for petitioners. *Solicitor General Marshall, Assistant Attorney General Douglas, Morton Hollander* and *John C. Eldridge* for respondent. Reported below: 81 Nev. 199, 401 P. 2d 60.

No. 479. MORRISON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Raymond A. Brown* and *Irving I. Vogelman* for petitioner. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 348 F. 2d 1003.

No. 474. **Naumkeag Theatres Co., Inc.** *v.* **New England Theatres, Inc., et al.** C. A. 1st Cir. Certiorari denied. *Timothy J. Davern* for petitioner. *Robert W. Meserve, John R. Hally* and *Stuart Aarons* for respondents. Reported below: 345 F. 2d 910.

No. 478. **Village of Alsip** *v.* **United States.** C. A. 7th Cir. Certiorari denied. *Solicitor General Marshall, Acting Assistant Attorney General Roberts, Joseph Kovner* and *Herbert Grossman* for the United States. Reported below: 345 F. 2d 365.

No. 481. **Babcock Boulevard Land Co., Inc., et al.** *v.* **Pennsylvania.** Sup. Ct. Pa. Certiorari denied. *John B. Nicklas, Jr.,* for petitioners. *Walter E. Alessandroni,* Attorney General of Pennsylvania, and *George R. Specter* and *Robert W. Cunliffe,* Assistant Attorneys General, for respondent.

No. 485. **Davis** *v.* **Hoover, Director, Federal Bureau of Investigation, et al.** C. A. 7th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Marshall* for respondents. Reported below: 346 F. 2d 567.

No. 486. **Gusow et al.** *v.* **United States.** C. A. 10th Cir. Certiorari denied. *O. John Rogge* for petitioners. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Daniel H. Benson* for the United States. Reported below: 347 F. 2d 755.

No. 488. **Hullum, Administratrix** *v.* **St. Louis Southwestern Railway Co.** Ct. Civ. App. Tex., 12th Sup. Jud. Dist. Certiorari denied. *Max Garrett* for petitioner. *Clyde W. Fiddes* and *Jack W. Flock* for respondent. Reported below: 384 S. W. 2d 163.

No. 406. CROUCH, PROBATE JUDGE *v.* SHIELDS, GUARDIAN. Ct. Civ. App. Tex., 5th Sup. Jud. Dist. Motion to strike portions of respondent's brief and motion to defer consideration of petition denied. Certiorari denied. Petitioner *pro se.* *Joseph P. Burt* for respondent. Reported below: 385 S. W. 2d 580.

No. 461. ARBER ET AL. *v.* AMERICAN AIRLINES, INC. C. A. 1st Cir. Certiorari denied. MR. JUSTICE FORTAS took no part in the consideration or decision of this petition. *David B. Kaplan* for petitioners. Reported below: 345 F. 2d 130.

No. 482. ECKEL *v.* BRENNER, COMMISSIONER OF PATENTS. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE FORTAS took no part in the consideration or decision of this petition. *William Douglas Sellers, George A. Brace* and *Munson H. Lane* for petitioner. *Solicitor General Marshall, Assistant Attorney General Douglas, Sherman L. Cohn* and *Jack H. Weiner* for respondent.

No. 480. FAWCETT, ADMINISTRATRIX *v.* MISSOURI PACIFIC RAILROAD CO. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *John A. Hickman* for petitioner. *William C. Dowdy, Jr.,* for respondent. Reported below: 347 F. 2d 233.

No. 213, Misc. BALL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *John Frank Dugger* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 344 F. 2d 925.

No. 421, Misc. SUMMERS *v.* WASHINGTON ET AL. Sup. Ct. Wash. Certiorari denied.

No. 55, Misc. Richard *v.* United States. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall*, former *Solicitor General Cox*, *Assistant Attorney General Vinson*, *Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 341 F. 2d 475.

No. 225, Misc. Hobbs *v.* United States. C. A. 7th Cir. Certiorari denied. *George L. Saunders* for petitioner. *Solicitor General Marshall*, *Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 340 F. 2d 848.

No. 317, Misc. Conner *v.* United States. C. A. 3d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall*, *Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 345 F. 2d 794.

No. 332, Misc. Powers *v.* California. Super. Ct. Cal., City and County of S. F. Certiorari denied.

No. 366, Misc. Starnes *v.* Markley, Warden. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall*, *Assistant Attorney General Doar*, *David Rubin* and *Gerald P. Choppin* for respondent. Reported below: 343 F. 2d 535.

No. 392, Misc. Oliver *v.* United States. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States.

No. 539, Misc. Ramirez-Villa *v.* Immigration and Naturalization Service. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for respondent. Reported below: 347 F. 2d 985.

No. 386, Misc. **Frady et al.** *v.* **United States.** C. A. D. C. Cir. Certiorari denied. *Henry Lincoln Johnson, Jr.,* for petitioners. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 121 U. S. App. D. C. 78, 348 F. 2d 84.

No. 411, Misc. **Williams** *v.* **United States.** C. A. 8th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 469, Misc. **Crowder** *v.* **United States.** C. A. 6th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 346 F. 2d 1.

No. 470, Misc. **Chapman** *v.* **United States.** C. A. 9th Cir. Certiorari denied. *Abe F. Levy* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 346 F. 2d 383.

No. 486, Misc. **Saylor** *v.* **United States Board of Parole et al.** C. A. D. C. Cir. Certiorari denied. Petitioner *pro se. Solicitor General Marshall, Assistant Attorney General Doar, David Rubin* and *Gerald P. Choppin* for respondents. Reported below: 120 U. S. App. D. C. 206, 345 F. 2d 100.

No. 515, Misc. **Turner** *v.* **Fay, Warden.** C. A. 2d Cir. Certiorari denied.

No. 524, Misc. **Hernandez** *v.* **California.** C. A. 9th Cir. Certiorari denied.

No. 523, Misc. HALL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Leon B. Polsky* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Ronald L. Gainer* for the United States. Reported below: 346 F. 2d 875.

No. 533, Misc. CLARK *v.* ILLINOIS. C. A. 7th Cir. Certiorari denied.

No. 541, Misc. BROWN *v.* BROUGH, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 346 F. 2d 149.

No. 546, Misc. GOLDEN *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Carl L. Shipley* and *Thomas A. Ziebarth* for petitioner. *Solicitor General Marshall* for the United States. Reported below: 170 Ct. Cl. 904.

No. 549, Misc. MITCHELL *v.* FLORIDA. C. A. 5th Cir. Certiorari denied.

No. 558, Misc. GOODMAN *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States.

No. 568, Misc. BUFFINGTON *v.* MARTIN, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 572, Misc. MOUNTJOY *v.* MOUNTJOY. C. A. D. C. Cir. Certiorari denied. *Isadore B. Katz* for petitioner. *Charles C. Collins* for respondent. Reported below: 121 U. S. App. D. C. 27, 347 F. 2d 811.

No. 623, Misc. JOHNSON *v.* EVENING STAR NEWSPAPER CO. ET AL. C. A. D. C. Cir. Certiorari denied. *Ira M. Lowe* for petitioner. Reported below: 120 U. S. App. D. C. 122, 344 F. 2d 507.

No. 570, Misc. Corey *v.* United States. C. A. 1st Cir. Certiorari denied. *Russell Morton Brown* and *Maurice C. Goodpasture* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 346 F. 2d 65.

No. 574, Misc. Lang *v.* Alabama. Sup. Ct. Ala. Certiorari denied. Reported below: 278 Ala. 295, 177 So. 2d 920.

No. 576, Misc. Leyde *v.* Rhay, Penitentiary Superintendent. Super. Ct. Wash., Walla Walla County. Certiorari denied.

No. 583, Misc. Reece *v.* Rhay, Penitentiary Superintendent, et al. Sup. Ct. Wash. Certiorari denied.

No. 604, Misc. Capson *v.* United States. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 347 F. 2d 959.

No. 629, Misc. Privitera *v.* Kross, Correction Commissioner. C. A. 2d Cir. Certiorari denied. *Leon B. Polsky* for petitioner. *Frank S. Hogan* and *H. Richard Uviller* for respondent. Reported below: 345 F. 2d 533.

Rehearing Denied.

No. 642, Misc., October Term, 1964. Walker *v.* Internal Revenue Service et al., 380 U. S. 926, 989. Motion for leave to file second petition for rehearing denied. The Chief Justice and Mr. Justice Fortas took no part in the consideration or decision of this motion.

No. 36, Misc. WILSON *v.* MCGEE, ADMINISTRATOR, ET AL., *ante*, p. 849;

No. 220, Misc. WHALEM *v.* UNITED STATES, *ante*, p. 862;

No. 296, Misc. GAINES *v.* UNITED STATES, *ante*, p. 866; and

No. 393, Misc. MITCHELL *v.* FLORIDA, *ante*, p. 804. Petitions for rehearing denied.

NOVEMBER 15, 1965.

Miscellaneous Orders.

No. 45. LINN *v.* UNITED PLANT GUARD WORKERS OF AMERICA, LOCAL 114, ET AL. C. A. 6th Cir. (Certiorari granted, 381 U. S. 923.) The motion of Schnell Tool & Die Corp. et al. is granted insofar as permission to file a brief, as *amici curiae*, is requested, and is denied insofar as permission to participate in oral argument is requested. *Russell E. Leasure* and *Ralph Atkinson* on the motion.

No. 492. MCFADDIN EXPRESS, INC., ET AL. *v.* ADLEY CORP. ET AL. C. A. 2d Cir. The Solicitor General is invited to file a brief expressing the views of the United States.

No. 281, Misc. O'CONNOR *v.* OHIO. Appeal from Sup. Ct. Ohio. (Appeal dismissed and certiorari denied, *ante*, p. 19.) The appellee is requested to file a response to the petition for rehearing within thirty days.

No. 626, Misc. PASQUINZO *v.* UNITED STATES;

No. 685, Misc. CONOVER *v.* HEROLD, STATE HOSPITAL DIRECTOR;

No. 709, Misc. TOM *v.* UNITED STATES; and

No. 715, Misc. ADAMS *v.* RUNDLE, CORRECTIONAL SUPERINTENDENT. Motions for leave to file petitions for writs of habeas corpus denied.

No. 689, Misc. Williams *v.* Florida. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for writ of certiorari, certiorari is denied.

Probable Jurisdiction Noted.

No. 445. Illinois Central Railroad Co. et al. *v.* Norfolk & Western Railway Co. et al.;

No. 484. Calumet Harbor Terminals, Inc., et al. *v.* Norfolk & Western Railway Co. et al.; and

No. 543. United States et al. *v.* Norfolk & Western Railway Co. et al. Appeal from D. C. N. D. Ohio. Probable jurisdiction noted. Cases consolidated and a total of two hours allotted for oral argument. *William J. O'Brien, Jr., Robert Mitten, Robert H. Bierma, Edmund A. Schroer* and *John C. Lawyer* for appellants in No. 445. *Charles B. Myers* for appellants in No. 484. *Solicitor General Marshall, Assistant Attorney General Turner, Lionel Kestenbaum, Jerry Z. Pruzansky, Robert W. Ginnane* and *Robert S. Burk* for the United States et al. in No. 543. *John L. Bordes* and *Martin L. Cassell* for Chicago, Rock Island & Pacific Railroad Co. et al., appellees in all cases. Reported below: 241 F. Supp. 974.

Certiorari Granted. (See also Nos. 415 and 416, *ante,* p. 103.)

No. 412. Shillitani *v.* United States. C. A. 2d Cir. Certiorari granted limited to Questions 1 and 2 presented by the petition which read as follows:

"1. Was the appellant denied his constitutional right to indictment and trial by jury?

"2. Does the 'admixture of civil and criminal contempt' invalidate the judgment of conviction?"

Albert J. Krieger for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 345 F. 2d 290.

No. 383. Neely *v.* Martin K. Eby Construction Co., Inc. C. A. 10th Cir. Certiorari granted. In addition to all the questions presented by the petition, counsel are requested to brief and discuss at oral argument the following questions:

"1. Whether the Court of Appeals, after deciding that respondent should have been granted a judgment *n. o. v.*, had power under Rule 50 of the Federal Rules of Civil Procedure and our decisions in *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U. S. 212; *Globe Liquor Co.* v. *San Roman*, 332 U. S. 571; and *Weade* v. *Dichmann, Wright & Pugh*, 337 U. S. 801, to order the case dismissed and thereby deprive petitioner of any opportunity to invoke the trial court's discretion on the issue of whether petitioner should have a new trial?

"2. Whether the Court of Appeals erred in ordering the District Court not merely to enter a judgment *n. o. v.* for respondent but to dismiss plaintiff's case in view of Rule 50 (c)(2) of the Federal Rules of Civil Procedure which gives a party whose verdict has been set aside the right to make a motion for a new trial not later than 10 days after entry of the judgment notwithstanding the verdict?"

Charles A. Friedman for petitioner. *Anthony F. Zarlengo* and *Joseph S. McCarthy* for respondent. Reported below: 344 F. 2d 482.

No. 489. Utah Pie Co. *v.* Continental Baking Co. et al. C. A. 10th Cir. Certiorari granted. In addition to all the questions presented by the petition, counsel are requested to brief and discuss at oral argument the following questions:

"1. Whether, if this Court affirms the judgment and order of the Court of Appeals directing the District Court to enter judgment for respondents, petitioner can then make a motion for new trial under Rule 50 (c)(2) of the Federal Rules of Civil Procedure within 10 days of the District Court's entry of judgment for respondents?

"2. Whether, if under the order of the Court of Appeals, petitioner cannot make a motion for new trial under Rule 50 (c)(2) within 10 days of the District Court's entry of judgment against him, the order of the Court of Appeals directing the District Court to enter judgment for respondents is compatible with Rule 50 (b) as interpreted by this Court in *Cone* v. *West Virginia Pulp & Paper Co.,* 330 U. S. 212; *Globe Liquor Co.* v. *San Roman,* 332 U. S. 571; and *Weade* v. *Dichmann, Wright & Pugh,* 337 U. S. 801?

"3. Whether Rule 50 (d) of the Federal Rules of Civil Procedure provides the Court of Appeals with any authority to direct the entry of judgment for respondents?"

Joseph L. Alioto for petitioner. *John H. Schafer* for Continental Baking Co., *Peter W. Billings* and *James R. Baird, Jr.,* for Carnation Co., and *George P. Lamb* and *Carrington Shields* for Pet Milk Co., respondents. Reported below: 349 F. 2d 122.

No. 502. DENNIS ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari granted limited to Questions 1, 2, and 3 presented by the petition, which read as follows:

"1. Whether the indictment states the offense of conspiracy to defraud the United States;

"2. Whether, in the comparative light of *American Communications Assn.* v. *Douds,* 339 U. S. 382, and *United States* v. *Archie Brown,* 381 U. S. 437, Section 9 (h) of the Taft-Hartley Act is constitutional;

"3. Whether the trial court erred in denying petitioners' motions for the production, to the defense or the Court, of grand jury testimony of prosecution witnesses."

Nathan Witt, George J. Francis and *Telford Taylor* for petitioners. *Solicitor General Marshall, Assistant Attorney Yeagley* and *George B. Searls* for the United States.

Gerhard P. Van Arkel, Charles F. Brannan, John F. O'Donnell, Joseph L. Rauh, Jr., Eugene Cotton, Melvin L. Wulf, Jacob Sheinkman, Joseph M. Jacobs and *John Ligtenberg* for the American Civil Liberties Union et al., in support of the petition. Reported below: 346 F. 2d 10.

No. 442. PAPPADIO *v.* UNITED STATES. C. A. 2d Cir. Certiorari granted limited to Questions 1, 2, and 3 presented by the petition which read as follows:

"1. Whether petitioner should have been granted a trial by jury on a charge of criminal contempt of court where he has been sentenced to two years' imprisonment.

"2. Whether the District Court could legally sentence petitioner to two years' imprisonment for contempt of court following a non-jury hearing under Rule 42 (b) of the Federal Rules of Criminal Procedure.

"3. Whether, assuming *arguendo* that a sentence of two years may be imposed for criminal contempt without a trial by jury, there was an abuse of discretion in sentencing petitioner to two years' imprisonment for refusing to answer five questions where he had answered more than one hundred questions."

Case placed on the summary calendar and set for argument immediately following No. 412.

Jacob Kossman for petitioner. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 346 F. 2d 5.

No. 490. SHEPPARD *v.* MAXWELL, WARDEN. C. A. 6th Cir. Motion of the American Civil Liberties Union et al. for leave to file brief, as *amici curiae,* granted. Certiorari granted. *F. Lee Bailey* and *Russell A. Sherman* for petitioner. *William B. Saxbe,* Attorney General of Ohio, and *David L. Kessler,* Assistant Attorney General, for respondent. *Bernard A. Berkman* and *Mel-*

vin L. Wulf for the American Civil Liberties Union et al., as *amici curiae,* in support of the petition. *John T. Corrigan* and *Gertrude Bauer Mahon* for the State of Ohio, as *amicus curiae,* on behalf of respondent. Reported below: 346 F. 2d 707.

No. 67. CHEFF *v.* SCHNACKENBERG, U. S. CIRCUIT JUDGE, ET AL. C. A. 7th Cir. Certiorari granted limited to Question 3 presented by the petition which reads as follows:

"3. Whether, after denial of a demand for jury trial, the sentence of imprisonment of six months imposed upon petitioner is constitutionally permissible under Article III and the Sixth Amendment."

Case placed on the summary calendar and set for argument immediately following No. 442.

Richard M. Keck for petitioner. *Solicitor General Cox, E. K. Elkins* and *Miles J. Brown* for respondents. Reported below: 341 F. 2d 548.

Certiorari Denied. (See also Nos. 497 and 498, *ante,* p. 107; No. 512, *ante,* p. 108; No. 520, *ante,* p. 108; and No. 689, Misc., *supra.*)

No. 493. HAMMONS *v.* OREGON. Sup. Ct. Ore. Certiorari denied. *Milton Heller* for petitioner. *George Van Hoomissen* and *George M. Joseph* for respondent.

No. 504. SHELTON *v.* GEORGIA. Ct. App. Ga. Certiorari denied. *Wesley R. Asinof* for petitioner. *Lewis R. Slaton* and *J. Walter LeCraw* for respondent. Reported below: 111 Ga. App. 351, 141 S. E. 2d 776.

No. 507. FATA *v.* CO-ORDINATING COMMITTEE ON DISCIPLINE. Ct. App. N. Y. Certiorari denied. *Matthew H. Brandenburg* for petitioner. *Angelo T. Cometa* for respondent.

No. 491. CROSS, DBA CROSS POULTRY CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 4th Cir. Certiorari denied. *Eugene C. Brooks, Jr.*, and *Lucius W. Pullen* for petitioner. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 346 F. 2d 165.

No. 495. VITASAFE CORP. ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Milton A. Bass* and *Solomon H. Friend* for petitioners. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Paul R. Walsh* for the United States. Reported below: 345 F. 2d 864.

No. 509. A/S SKAUGAAS (I. M. SKAUGEN), AS OWNER OF THE SKAUSTRAND *v.* DREDGE CARTEGENA ET AL. C. A. 4th Cir. Certiorari denied. *Charles S. Haight* and *Carlyle Barton, Jr.*, for petitioner. *John F. Gerity* and *John H. Skeen, Jr.*, for respondents. Reported below: 345 F. 2d 275.

No. 513. HARVEY *v.* LYONS ET AL. Sup. Ct. N. J. Certiorari denied. Petitioner *pro se*. *David S. Bate* for respondents.

No. 515. EWING, EXECUTOR *v.* ROUNTREE, DISTRICT DIRECTOR OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. *S. Shepherd Tate* for petitioner. *Solicitor General Marshall, Acting Assistant Attorney General Roberts* and *Gilbert E. Andrews* for respondent. Reported below: 346 F. 2d 471.

No. 514. DEUTSCH *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. *George J. Malinsky* for petitioner. *Frank S. Hogan* and *H. Richard Uviller* for respondent.

No. 516. PACIFIC FAR EAST LINE, INC. *v.* JONES STEVEDORING CO. C. A. 9th Cir. Certiorari denied. *John Hays* for petitioner. Reported below: 346 F. 2d 642.

No. 517. HUNTER *v.* TALBOT. C. A. 2d Cir. Certiorari denied. Petitioner *pro se. Solicitor General Marshall, Acting Assistant Attorney General Roberts* and *Joseph M. Howard* for respondent. Reported below: 345 F. 2d 513.

No. 519. GISH *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied.

No. 522. BOUGHNER *v.* SCHULZE, SPECIAL AGENT, INTERNAL REVENUE SERVICE, ET AL. C. A. 7th Cir. Certiorari denied. *William A. Barnett* for petitioner. *Solicitor General Marshall, Acting Assistant Attorney General Roberts, Joseph M. Howard* and *Burton Berkley* for respondent Schulze. Reported below: 350 F. 2d 666.

No. 524. SCHWARTZ, EXECUTRIX *v.* THE NASSAU ET AL. C. A. 2d Cir. Certiorari denied. *Henry Wimpfheimer* for petitioner. *J. Daniel Dougherty* and *Charles N. Fiddler* for respondents. Reported below: 345 F. 2d 465.

No. 587, Misc. SCHLETTE *v.* HALBERT, U. S. DISTRICT JUDGE, ET AL. C. A. 9th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Marshall, Assistant Attorney General Doar* and *David L. Norman* for respondent Halbert.

No. 483. GRAY *v.* WILSON, WARDEN. C. A. 9th Cir. Motion for leave to file supplement to petition granted. Certiorari denied. *Marshall W. Krause* and *Lawrence Speiser* for petitioner. Reported below: 345 F. 2d 282.

No. 483, Misc. GOODWIN *v.* UNITED STATES;
No. 484, Misc. VAUGHN *v.* UNITED STATES; and
No. 603, Misc. WILLIAMS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioners *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Ronald L. Gainer* for the United States. Reported below: 121 U. S. App. D. C. 9, 347 F. 2d 793.

No. 529, Misc. MITCHELL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States. Reported below: 344 F. 2d 935.

No. 566, Misc. KEATON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States. Reported below: 349 F. 2d 374.

No. 580, Misc. SCOTT *v.* MACDOUGALL ET AL. Sup. Ct. S. C. Certiorari denied. Reported below: 246 S. C. 252, 143 S. E. 2d 457.

No. 599, Misc. HUNT *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 606, Misc. TAHTINEN *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 622, Misc. GOMEZ *v.* COLORADO. Sup. Ct. Colo. Certiorari denied.

No. 620, Misc. COLTER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 617, Misc. GADSDEN ET AL. *v.* FRIPP ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 343 F. 2d 824.

No. 634, Misc. D'AMBROSIO *v.* FAY, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 349 F. 2d 957.

No. 635, Misc. BLASETTI *v.* WARDEN, ATTICA PRISON. C. A. 2d Cir. Certiorari denied. *Frances Kahn* for petitioner.

No. 641, Misc. MUZA *v.* CALIFORNIA ADULT AUTHORITY ET AL. Sup. Ct. Cal. Certiorari denied.

No. 642, Misc. POLK *v.* MINNESOTA COMMISSIONER OF CORRECTIONS ET AL. C. A. 8th Cir. Certiorari denied.

No. 651, Misc. WILLIAMS *v.* JETT, SHERIFF, ET AL. Sup. Ct. Tenn. Certiorari denied. Petitioner *pro se*. *George F. McCanless*, Attorney General of Tennessee, and *William H. Lassiter, Jr.*, Assistant Attorney General, for respondents.

No. 670, Misc. FARRELL *v.* GARDNER, SECRETARY OF HEALTH, EDUCATION AND WELFARE. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for respondent.

No. 290, Misc. BARKSDALE *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Jack Greenberg, Michael Meltsner, Robert F. Collins* and *Nils R. Douglas* for petitioner. *Jack P. F. Gremillion*, Attorney General of Louisiana, *William P. Schuler*, Assistant Attorney General, and *Jim Garrison* for respondent. Reported below: 247 La. 198, 170 So. 2d 374.

Rehearing Denied.

No. 107. **Waltham Watch Co. et al.** *v.* **Federal Trade Commission,** *ante,* p. 813;

No. 174. **Gosser** *v.* **United States,** *ante,* p. 819;

No. 296. **Bankers Bond Co., Inc., et al.** *v.* **All States Investors, Inc., et al.,** *ante,* p. 830;

No. 308. **Maddox** *v.* **Willis et al.,** *ante,* p. 18;

No. 41, Misc. **Reed** *v.* **United States,** *ante,* p. 849;

No. 42, Misc. **Samurine** *v.* **United States,** *ante,* p. 849;

No. 101, Misc. **Duval** *v.* **United States,** *ante,* p. 854;

No. 109, Misc. **McMullen** *v.* **Gardner, Secretary of Health, Education and Welfare,** *ante,* p. 854;

No. 133, Misc. **Spiesel** *v.* **City of New York,** *ante,* p. 856;

No. 166, Misc. **Vesay** *v.* **United States,** *ante,* p. 859;

No. 170, Misc. **Miguel** *v.* **United States,** *ante,* p. 859;

No. 179, Misc. **Henderson** *v.* **Maxwell, Warden,** *ante,* p. 804;

No. 227, Misc. **Levy** *v.* **United States,** *ante,* p. 862;

No. 314, Misc. **Anderson et al.** *v.* **United States,** *ante,* p. 880;

No. 342, Misc. **Hourihan** *v.* **Mahoney,** *ante,* p. 17;

No. 426, Misc. **Warriner** *v.* **Fink et al.,** *ante,* p. 871;

No. 431, Misc. **Kelly** *v.* **Kansas,** *ante,* p. 881; and

No. 436, Misc. **Long** *v.* **Pate, Warden,** *ante,* p. 881. Petitions for rehearing denied.

No. 22, Misc. **Davis** *v.* **Beto, Corrections Director,** *ante,* p. 804. Petition for rehearing denied. **The Chief Justice** took no part in the consideration or decision of this petition.

November 16, 1965.

Dismissal Under Rule 60.

No. 579. General Auto Supplies, Inc., et al. *v.* Federal Trade Commission. C. A. 7th Cir. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. *Bernard Mellitz, Malcolm I. Frank* and *Telford B. Orbison* for petitioners. Reported below: 346 F. 2d 311.

November 19, 1965.

Dismissal Under Rule 60.

No. 573. Frank et al. *v.* United States. C. A. D. C. Cir. Petition for writ of certiorari as to petitioner Frank dismissed pursuant to Rule 60 of the Rules of this Court. *Edward L. Carey* and *Walter E. Gillcrist* for petitioners. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 120 U. S. App. D. C. 392, 347 F. 2d 486.

November 22, 1965.

Miscellaneous Orders.

No. 359. Johnson *v.* United States. C. A. 6th Cir. (Certiorari denied, *ante*, p. 836.) The Solicitor General is requested to file a response to the petition for a rehearing within thirty days.

No. 718, Misc. Williamson et al. *v.* Blankenship, Judge, et al. C. A. 5th Cir. Motion for leave to file petition for writ of certiorari denied.

No. 676, Misc. Walker *v.* Superior Court of California in and for the City and County of San Francisco. Motion for leave to file petition for writ of prohibition denied. The Chief Justice took no part in the consideration or decision of this motion.

No. 56, Misc. IN RE DISBARMENT OF HARRIS. It having been reported to the Court that Eldon C. Harris of Cut Bank, State of Montana, has been disbarred from the practice of law by the Supreme Court of the State of Montana, duly entered on the 4th day of March, 1965, and this Court by order of March 29, 1965, having suspended the said Eldon C. Harris from the practice of law in this Court and directed that a rule issue requiring him to show cause why he should not be disbarred;

And it appearing that the said rule was duly issued and served upon the respondent, and that the time within which to file a return to the rule has expired;

IT IS ORDERED that the said Eldon C. Harris be, and he is hereby, disbarred from the practice of law in this Court and that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court.

Probable Jurisdiction Noted.

No. 545. JOSEPH E. SEAGRAM & SONS, INC., ET AL. *v.* HOSTETTER, CHAIRMAN, NEW YORK STATE LIQUOR AUTHORITY, ET AL. Appeal from Ct. App. N. Y. Probable jurisdiction noted. *Herbert Brownell* and *Thomas F. Daly* for appellants. *Louis J. Lefkowitz,* Attorney General of New York, *Ruth Kessler Toch,* Assistant Solicitor General, and *Robert L. Harrison,* Assistant Attorney General, for appellees. Reported below: 16 N. Y. 2d 47, 209 N. E. 2d 701.

Certiorari Granted. (See also No. 543, October Term, 1963, *ante,* p. 158.)

No. 80, Misc. WESTOVER *v.* UNITED STATES. C. A. 9th Cir. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari granted. The case is transferred to the appellate docket and set for oral argument immediately following No. 397, Misc. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 342 F. 2d 684.

No. 535. UNITED STATES *v.* CATTO ET AL. C. A. 5th Cir. Certiorari granted. *Solicitor General Marshall, Acting Assistant Attorney General Jones, Acting Assistant Attorney General Roberts, Jack S. Levin* and *Melva M. Graney* for the United States. *Ben F. Foster* for Catto et al., and *Claiborne B. Gregory* for Wardlaw et al., respondents. Reported below: 344 F. 2d 225, 227.

No. 397, Misc. VIGNERA *v.* NEW YORK. Ct. App. N. Y. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari granted. The case is transferred to the appellate docket and set for oral argument immediately following No. 419, Misc. *Robert S. Rifkind* for petitioner. *William I. Siegel* for respondent. Reported below: 15 N. Y. 2d 970, 207 N. E. 2d 527.

No. 419, Misc. MIRANDA *v.* ARIZONA. Sup. Ct. Ariz. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari granted. The case is transferred to the appellate docket. *John P. Frank* for petitioner. *Darrell F. Smith,* Attorney General of Arizona, and *William E. Eubank* and *Gary K. Nelson,* Assistant Attorneys General, for respondent. Reported below: 98 Ariz. 18, 401 P. 2d 721.

No. 205, Misc. JOHNSON ET AL. *v.* NEW JERSEY. Sup. Ct. N. J. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari granted. The case is transferred to the appellate docket and set for oral argument immediately following No. 80, Misc. *M. Gene Haeberle, Stanford Shmukler* and *Curtis R. Reitz* for petitioners. *Norman Heine* for respondent. Reported below: 43 N. J. 572, 206 A. 2d 737.

Certiorari Denied. (See also No. 672, Misc., *ante*, p. 161.)

No. 518. OLING ET AL. *v.* AIR LINE PILOTS ASSOCIATION ET AL. C. A. 7th Cir. Certiorari denied. *I. J. Gromfine* and *Herman Sternstein* for petitioners. *Samuel J. Cohen* and *Herbert A. Levy* for Air Line Pilots Association, and *Stuart Bernstein* for United Air Lines, Inc., respondents. Reported below: 346 F. 2d 270.

No. 525. CAMCO, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. *L. G. Clinton, Jr.*, for petitioner. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli, Norton J. Come* and *Leonard M. Wagman* for respondent. Reported below: 340 F. 2d 803.

No. 526. WHEELER *v.* JONES. Sup. Ct. Ark. Certiorari denied. *G. Thomas Eisele* for petitioner. *Leon B. Catlett* for respondent. Reported below: 239 Ark. 455, 390 S. W. 2d 129.

No. 527. CONTE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Marvin A. Koblentz* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 349 F. 2d 304.

No. 529. KING *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Peter J. Hughes* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 348 F. 2d 814.

No. 533. A AND B *v.* C AND D. Sup. Ct. Ark. Certiorari denied. *James L. Sloan* for petitioners. *Robert V. Light* for respondents. Reported below: 239 Ark. 406, 390 S. W. 2d 116.

No. 530. GARDENS OF FAITH, INC., ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. *John Y. Merrell* for petitioners. *Solicitor General Marshall, Acting Assistant Attorney General Roberts* and *Melva M. Graney* for respondent. Reported below: 345 F. 2d 180.

No. 536. CHICAGO, ROCK ISLAND & PACIFIC RAILROAD CO. *v.* MCCONNELL HEAVY HAULING, INC. Sup. Ct. Ark. Certiorari denied. *Edward L. Wright* for petitioner. *Jack Holt, Jr.,* for respondent. Reported below: 239 Ark. 373, 390 S. W. 2d 111.

No. 538. MY STORE, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. *Henry E. Seyfarth* for petitioner. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 345 F. 2d 494.

No. 539. BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Samuel B. Stewart* and *William D. Donnelly* for petitioner. *Solicitor General Marshall, Acting Assistant Attorney General Roberts, Joseph Kovner* and *Frederick E. Youngman* for the United States. *John P. Austin* for California Bankers Association, as *amicus curiae,* in support of the petition. Reported below: 345 F. 2d 624.

No. 227. BULLOCK *v.* VIRGINIA. Sup. Ct. App. Va. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Calvin H. Childress* for petitioner. *Robert Y. Button,* Attorney General of Virginia, and *D. Gardiner Tyler,* Assistant Attorney General, for respondent. Reported below: 205 Va. 867, 140 S. E. 2d 821.

No. 149. Martin *v.* Texas;

Nos. 345 and 508. McClelland *v.* Texas. Ct. Crim. App. Tex. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. *Clyde W. Woody* and *Marian S. Rosen* for petitioner in No. 149. *J. Edwin Smith* and *Byron Skelton* for petitioner in Nos. 345 and 508. *Samuel H. Robertson, Jr.,* and *Carl E. F. Dally* for respondent. Reported below: No. 345, 389 S. W. 2d 678; No. 508, 390 S. W. 2d 777.

Memorandum of Mr. Chief Justice Warren.

Each of these three cases stems from the following factual setting:

The Grand Jury of Harris County, Texas, was impaneled on May 7, 1962, to investigate irregularities in the administration of the Probate Court. While Grand Jury sessions were proceeding, the District Attorney of the County, in cooperation with the Justice of the Peace, took the virtually unprecedented step of obtaining an order to institute a "Court of Inquiry."

This body, formerly sanctioned by Vernon's Texas Code of Criminal Procedure, Arts. 886, 887, permits a justice of the peace to summon and examine witnesses and take sworn testimony. Those who fail to comply with his summons or refuse to make statements under oath may be fined and imprisoned. From the year of its enactment—1876—to this date, it appears that the procedure had been seldom invoked.

The secret Grand Jury deliberations were postponed while the District Attorney pursued the Court of Inquiry publicly, in front of the press, radio recorders and television cameras. In this inflamed atmosphere, the petitioners were questioned for some four days, although they objected to testifying. They were not permitted to consult with their attorneys during the proceedings, to defend themselves, to cross-examine or confront the witnesses against them, to call witnesses on their behalf, to rebut or to contradict the evidence produced by the prosecution. Two days later, the Grand Jury was reconvened and brought in indictments against the petitioners.

Due to a change of venue and continuances secured by the petitioners, their trials did not take place until more than two years later in a neighboring county. Their pretrial motions to quash the indictments were denied, in two cases without hearings, and they were found guilty of the offenses charged.

The Texas Legislature has since repealed the "Court of Inquiry" proceeding through the adoption of a new Code of Criminal Procedure, Laws 1965, 59th Leg., Reg. Sess., c. 722, to become effective January 1, 1966. Under the new Code, no justice of the peace may convene a Court of Inquiry. Rather, such a court may be conducted only by district judges, and all witnesses are entitled to the same protections as in felony prosecutions. Arts. 52.01–52.06.

It is clear that grave constitutional questions are raised by conducting such a proceeding. See, *e. g., Estes* v. *Texas,* 381 U. S. 532; *Moore* v. *Dempsey,* 261 U. S. 86, 90–91. Against the background of the factors mentioned above, the Court has declined review. Our denial of the petitions for certiorari in these cases should not be taken in any way as sanctioning the proceedings or of approving of the judgments below. It means only that for one reason or another these cases did not commend themselves "to at least four members of the Court as falling within those considerations which should lead this Court to exercise its discretion in reviewing a lower court's decision." Memorandum of Mr. Justice Frankfurter, *Sheppard* v. *Ohio,* 352 U. S. 910, 911; see also, *Maryland* v. *Baltimore Radio Show, Inc.,* 338 U. S. 912.

No. 257, Misc. MONTOYA *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Petitioner *pro se*. *Thomas C. Lynch,* Attorney General of California, and *Robert R. Granucci* and *John F. Kraetzer,* Deputy Attorneys General, for respondent.

No. 320, Misc. BRYE *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Sup. Ct. Fla. Certiorari denied. Petitioner *pro se*. *Earl Faircloth,* Attorney General of Florida, and *John S. Burton,* Assistant Attorney General, for respondent.

No. 337, Misc. BOLES *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Petitioner *pro se*. *Waggoner Carr,* Attorney General of Texas, and *Allo B. Crow, Jr., Hawthorne Phillips, T. B. Wright* and *Howard M. Fender,* Assistant Attorneys General, for respondent.

No. 451, Misc. ORTEGA *v.* THORNTON, U. S. DISTRICT JUDGE. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for respondent.

No. 471, Misc. HAWKES *v.* WARDEN, MISSOURI PENITENTIARY. Sup. Ct. Mo. Certiorari denied. Petitioner *pro se*. *Norman H. Anderson,* Attorney General of Missouri, and *Howard L. McFadden,* Assistant Attorney General, for respondent.

No. 517, Misc. GREEN *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *James J. Laughlin* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg* for the United States. Reported below: 121 U. S. App. D. C. 111, 348 F. 2d 340.

No. 611, Misc. STEVENSON *v.* ALTMAN, CLERK OF COOK COUNTY CIRCUIT COURT. C. A. 7th Cir. Certiorari denied.

No. 591, Misc. **Yates** *v.* **Mississippi.** Sup. Ct. Miss. Certiorari denied. *Lawrence Speiser* and *Bernard Roazen* for petitioner. Reported below: 253 Miss. 424, 175 So. 2d 617.

No. 592, Misc. **Massari** *v.* **United States.** C. A. 2d Cir. Certiorari denied. *Francis Kahn* for petitioner. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 347 F. 2d 725.

No. 602, Misc. **Edell** *v.* **Di Piazza et al.** C. A. 5th Cir. Certiorari denied. Reported below: 345 F. 2d 336.

No. 625, Misc. **Chaparro et al.** *v.* **Jackson & Perkins Co. et al.** C. A. 2d Cir. Certiorari denied. *Dora Aberlin* for petitioners. *William C. Combs* for respondents. Reported below: 346 F. 2d 677.

No. 636, Misc. **Harris** *v.* **Commissioner of Internal Revenue.** C. A. 2d Cir. Certiorari denied. Petitioner *pro se. Solicitor General Marshall, Acting Assistant Attorney General Roberts* and *Robert N. Anderson* for respondent.

No. 640, Misc. **Eaton** *v.* **United States.** C. A. 9th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 348 F. 2d 919.

No. 644, Misc. **Bookwalter** *v.* **California Adult Authority.** Dist. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 664, Misc. **Romano** *v.* **Fay, Warden.** C. A. 2d Cir. Certiorari denied. Reported below: 344 F. 2d 702.

No. 646, Misc. BURTON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Frances Kahn* for petitioner. *Solicitor General Marshall* for the United States.

No. 649, Misc. STEPHENS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Thomas Gilbert Sharpe, Jr.*, for petitioner. *Solicitor General Marshall* for the United States. Reported below: 347 F. 2d 722.

No. 659, Misc. BRATT *v.* CROUSE, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 346 F. 2d 146.

No. 665, Misc. NEAL *v.* MYERS, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 680, Misc. RITTER *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Petitioner *pro se*. *Benj. J. Jacobson* for respondent.

No. 682, Misc. KELLY *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. *Lloyd Tasoff* for petitioner. *Solicitor General Marshall* for respondent. Reported below: 349 F. 2d 473.

No. 707, Misc. SIMON *v.* CASTILLE ET AL. Sup. Ct. La. Certiorari denied. *J. Minos Simon* for petitioner.

No. 710, Misc. BEAZLEY *v.* ORSINGER. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Joseph G. Dooley* for respondent.

No. 272, Misc. LAMBERT *v.* KENTUCKY. Ct. App. Ky. Motion to strike brief of respondent denied. Certiorari denied. Petitioner *pro se*. *Robert Matthews*, Attorney General of Kentucky, and *David Murrell* and *Holland N. McTyeire*, Assistant Attorneys General, for respondent.

Rehearing Denied.

No. 66. LIST *v.* LERNER, DBA LERNER & CO., ET AL., *ante,* p. 811;

No. 80. RING *v.* NEW JERSEY, *ante,* p. 812;

No. 83. CROMBIE *v.* CROMBIE, *ante,* p. 812;

No. 105. WILLIAMS *v.* HOWARD JOHNSON'S, INC., OF WASHINGTON, *ante,* p. 814;

No. 119. UNITED STATES *v.* NEW ORLEANS CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., ET AL., *ante,* p. 17;

No. 142. FLYING TIGER LINE, INC. *v.* MERTENS, ADMINISTRATOR, ET AL., *ante,* p. 816;

No. 152. DEMERS *v.* BROWN ET AL., *ante,* p. 818;

No. 173. PINCIOTTI *v.* UNITED STATES, *ante,* p. 819;

No. 189. LICHTENSTEIN, AKA WELLS *v.* UNITED STATES, *ante,* p. 821;

No. 199. DIAZ ET AL. *v.* UNITED STATES, *ante,* p. 822;

No. 210. STEVENS *v.* MARKS, NEW YORK SUPREME COURT JUSTICE, *ante,* p. 809;

No. 290. STEVENS *v.* MCCLOSKEY, SHERIFF, *ante,* p. 809;

No. 278. STUPAK *v.* UNITED STATES, *ante,* p. 829;

No. 330. WADE *v.* UNITED STATES, *ante,* p. 834;

No. 334. NATIONAL MARITIME UNION OF AMERICA, AFL–CIO *v.* NATIONAL LABOR RELATIONS BOARD, *ante,* p. 835;

No. 403. NATIONAL MARITIME UNION OF AMERICA, AFL–CIO *v.* NATIONAL LABOR RELATIONS BOARD, *ante,* p. 840;

No. 405. SEMEL *v.* UNITED STATES, *ante,* p. 840;

No. 45, Misc. DEGREGORY *v.* UNITED STATES, *ante,* p. 850;

No. 186, Misc. BUDNER *v.* NEW YORK, *ante,* p. 860; and

No. 192, Misc. BYERS *v.* CROUSE, WARDEN, *ante,* p. 860. Petitions for rehearing denied.

No. 253, Misc. WILSON *v.* UNITED STATES, *ante,* p. 864;

No. 298, Misc. THACKER *v.* WARD MARKHAM CO., *ante,* p. 865; and

No. 511, Misc. IN RE DUARTE, *ante,* p. 883. Petitions for rehearing denied.

No. 98. WALKER *v.* FOSTER ET AL., *ante,* p. 812. Motion to dispense with printing petition granted. Petition for rehearing denied.

No. 260. NYYSSONEN, ADMINISTRATRIX *v.* BENDIX CORP., *ante,* p. 847; and

No. 319. ROCKEFELLER, GOVERNOR OF NEW YORK, ET AL. *v.* ORANS ET AL., *ante,* p. 10. Petitions for rehearing denied. MR. JUSTICE FORTAS took no part in the consideration or decision of these petitions.

DECEMBER 1, 1965.

Dismissal Under Rule 60.

No. 734. MCGRAW ET AL. *v.* CITY OF ENGLEWOOD ET AL. Sup. Ct. Colo. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. *John R. Barry* for petitioners. *Charles S. Rhyne, Brice W. Rhyne* and *Alfred J. Tighe, Jr.,* for respondents. Reported below: — Colo. —, 404 P. 2d 525.

DECEMBER 6, 1965.

Miscellaneous Orders.

No. 368. A BOOK NAMED "JOHN CLELAND'S MEMOIRS OF A WOMAN OF PLEASURE" *v.* ATTORNEY GENERAL OF MASSACHUSETTS. Appeal from Sup. Jud. Ct. Mass. (Probable jurisdiction noted, *ante,* p. 900.) Motion of the Citizens for Decent Literature, Inc., for leave to file brief, as *amicus curiae,* granted. Motion for leave to participate in oral argument, as *amicus curiae,* denied. *Charles H. Keating, Jr.,* on the motions.

No. 21, Original. **Wisconsin** *v.* **Minnesota et al.** Motion for leave to file bill of complaint denied. **The Chief Justice**, **Mr. Justice Stewart** and **Mr. Justice Fortas** are of the opinion that the motion for leave to file the bill of complaint should be set for oral argument. **Mr. Justice Douglas** took no part in the consideration or decision of this motion. *Bronson C. La Follette*, Attorney General of Wisconsin, *John H. Bowers*, Deputy Attorney General, and *A. J. Feifarek* and *Roy G. Tulane*, Assistant Attorneys General, for plaintiff. *Robert W. Mattson*, Attorney General of Minnesota, and *Perry Voldness*, Deputy Attorney General, for defendant State of Minnesota. *Randall J. LeBoeuf, Jr.*, and *Arthur R. Renquist* for defendant Northern States Power Co.

No. 784. **Watkins et al.** *v.* **Superior Court, Los Angeles County, et al.** Dist. Ct. App. Cal., 2d App. Dist. Motion for stay of injunction or expedited disposition of the petition for writ of certiorari presented to **Mr. Justice Douglas**, and by him referred to the Court, is denied. *Jack Greenberg*, *Raymond L. Johnson* and *Anthony G. Amsterdam* on the motion.

No. 390, Misc. **Whitlow** *v.* **Wainwright, Corrections Director.** Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for writ of certiorari, certiorari is denied. Petitioner *pro se*. *Earl Faircloth*, Attorney General of Florida, and *James G. Mahorner*, Assistant Attorney General, for respondent.

No. 185, Misc. **Herring** *v.* **District Court of Appeal of California, Second Appellate District.** Motion for leave to file petition for writ of mandamus denied. Petitioner *pro se*. *Thomas C. Lynch*, Attorney General of California, *William E. James*, Assistant Attorney General, and *George J. Roth*, Deputy Attorney General, for respondent.

No. 46. UNITED STATES *v.* GENERAL MOTORS CORP. ET AL. Appeal from D. C. S. D. Cal. (Probable jurisdiction noted, 380 U. S. 940.) Motion of O. M. Scott & Sons Co. et al. for leave to file brief, as *amici curiae,* granted. *Thomas A. Rothwell* and *William C. Hillman* on the motion.

No. 695. COLLIER *v.* UNITED STATES. C. A. 6th Cir. (Certiorari granted, *ante,* p. 890.) Motion for the appointment of counsel granted, and it is ordered that *Dean E. Denlinger, Esquire,* of Dayton, Ohio, be, and he is hereby, appointed to serve as counsel for the petitioner in this case.

Probable Jurisdiction Noted or Postponed.

No. 562. TIME, INC. *v.* HILL. Appeal from Ct. App. N. Y. Probable jurisdiction noted. *Harold R. Medina, Jr.,* and *Victor M. Earle III* for appellant. *Milton Black* for appellee. Reported below: 15 N. Y. 2d 986, 207 N. E. 2d 604.

No. 597. MILLS *v.* ALABAMA. Appeal from Sup. Ct. Ala. Further consideration of the question of jurisdiction in this case is postponed to the hearing of the case on the merits. *Kenneth Perrine* for appellant. *Richmond M. Flowers,* Attorney General of Alabama, and *Leslie Hall,* Assistant Attorney General, for appellee. *James C. Barton* for Alabama Press Association et al., as *amici curiae,* in support of appellant. Reported below: 278 Ala. 188, 176 So. 2d 884.

No. 611. UNITED STATES *v.* ARNOLD, SCHWINN & CO. ET AL. Appeal from D. C. N. D. Ill. Probable jurisdiction noted. The case is set for oral argument immediately following No. 238. *Solicitor General Marshall, Assistant Attorney General Turner* and *Lionel Kestenbaum* for the United States. *Harold D. Burgess, Robert C. Keck* and *Earl E. Pollock* for appellees. Reported below: 237 F. Supp. 323.

Certiorari Granted. (See also No. 532, *ante,* p. 198.)

No. 505. National Association for the Advancement of Colored People et al. *v.* Overstreet. Sup. Ct. Ga. Certiorari granted limited to Question 2 presented by the petition which reads as follows:

"2. Has petitioner National Association for the Advancement of Colored People, a New York corporation, been deprived of its property without due process of law under the Fourteenth Amendment by being held liable in damages for acts performed without its knowledge and by persons beyond its control?"

Donald L. Hollowell, Robert L. Carter and *Maria L. Marcus* for petitioners. *Hugh P. Futrell, Jr.,* for respondent. Reported below: 221 Ga. 16, 142 S. E. 2d 816.

No. 584. California *v.* Stewart. Sup. Ct. Cal. Certiorari granted. The case is set for oral argument immediately following No. 762. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Gordon Ringer,* Deputy Attorney General, for petitioner. Reported below: 62 Cal. 2d 571, 400 P. 2d 97.

No. 594. Gojack *v.* United States. C. A. D. C. Cir. Certiorari granted. *Edward J. Ennis, Osmond K. Fraenkel, Melvin L. Wulf, Frank J. Donner* and *David Rein* for petitioner. *Solicitor General Marshall, Assistant Attorney General Yeagley, Kevin T. Maroney* and *Robert L. Keuch* for the United States. Reported below: 121 U. S. App. D. C. 126, 348 F. 2d 355.

Certiorari Denied. (See also No. 595, *ante,* p. 203; No. 614, *ante,* p. 202; and No. 390, Misc., *supra.*)

No. 554. Martens *v.* Winder. C. A. 9th Cir. Certiorari denied. Reported below: 341 F. 2d 197.

No. 352. Lauritzen *v.* Spann. C. A. 3d Cir. Certiorari denied. *J. Ward O'Neill* and *Francis X. Byrn* for petitioner. *Philip Dorfman* and *John Dorfman* for respondent. *Cornelius P. Coughlan, J. Steward Harrison* and *Scott H. Elder* for American Merchant Marine Institute, Inc., et al., as *amici curiae,* in support of the petition. Reported below: 344 F. 2d 204.

No. 528. Bumb, Trustee in Bankruptcy *v.* Suhl et al. C. A. 9th Cir. Certiorari denied. *Joseph A. Ball* for petitioner. *Martin Gendel* for respondents. Reported below: 348 F. 2d 869.

No. 542. Pisano *v.* The Benny Skou et al. C. A. 2d Cir. Certiorari denied. *Harvey Goldstein* for petitioner. *J. Ward O'Neill* for The Benny Skou et al., and *Sidney A. Schwartz* and *Joseph Arthur Cohen* for John T. Clark & Son, respondents. Reported below: 346 F. 2d 993.

No. 547. Willow Terrace Development Co., Inc., et al. *v.* Commissioner of Internal Revenue. C. A. 5th Cir. Certiorari denied. *W. Carloss Morris, Jr.,* and *Robert H. McCanne* for petitioners. *Solicitor General Marshall, Acting Assistant Attorney General Roberts, Melva M. Graney* and *Robert A. Bernstein* for respondent. *Richard A. Mullens* for the National Association of Home Builders, as *amicus curiae,* in support of the petition. Reported below: 345 F. 2d 933.

No. 552. Chatsworth Cooperative Marketing Association et al. *v.* Interstate Commerce Commission. C. A. 7th Cir. Certiorari denied. *Norman Miller, Earl G. Schneider* and *Michael R. Galasso* for petitioners. *Solicitor General Marshall, Robert W. Ginnane* and *Bernard A. Gould* for respondent. Reported below: 347 F. 2d 821.

No. 546. Chance *v.* Atchison, Topeka & Santa Fe Railway Co. Sup. Ct. Mo. Certiorari denied. *Anthony P. Nugent, Sr.,* for petitioner. *George L. Gordon, Jr.,* for respondent. Reported below: 389 S. W. 2d 774.

No. 549. Keeling *v.* Ohio. Ct. App. Ohio, Cuyahoga County. Certiorari denied. *James R. Willis* for petitioner. *John T. Corrigan* for respondent.

No. 550. Prezioso *v.* United States. C. A. 2d Cir. Certiorari denied. *Maurice Edelbaum* for petitioner. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 348 F. 2d 217.

No. 553. Pugliano et al. *v.* United States. C. A. 1st Cir. Certiorari denied. *F. Lee Bailey* for petitioners. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 348 F. 2d 902.

No. 558. Atlantic Refining Co. *v.* Federal Trade Commission. C. A. 6th Cir. Certiorari denied. *Edward F. Howrey, Roy W. Johns* and *Edward J. Kremer, Jr.,* for petitioner. *Solicitor General Marshall, Assistant Attorney General Turner, Robert B. Hummel, James McI. Henderson* and *Alvin L. Berman* for respondent. Reported below: 344 F. 2d 599.

No. 568. Kiesling et al. *v.* United States et al. C. A. 3d Cir. Certiorari denied. *George D. Rothermel* and *Samuel Kalikman* for petitioners. *Solicitor General Marshall, Acting Assistant Attorney General Roberts* and *Meyer Rothwacks* for the United States et al. Reported below: 349 F. 2d 110.

No. 559. Thomson et al. *v.* Carman et al. Sup. Ct. Cal. Certiorari denied. *Alexander H. Schullman* for petitioners. *Michael G. Luddy* for Carman et al., *Charles G. Bakaly, Jr.,* for Association of Motion Picture Producers, Inc., et al., respondents.

No. 560. Laverick *v.* United States; and

No. 563. Schaeffer *v.* United States. C. A. 3d Cir. Certiorari denied. *George Elias, Jr.,* for petitioner in No. 560. *Frederic C. Ritger, Jr.,* for petitioner in No. 563. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 348 F. 2d 708.

No. 561. Brown *v.* Thompson, Judge, et al. Sup. Ct. App. W. Va. Certiorari denied. *Stanley E. Preiser* and *Arthur T. Ciccarello* for petitioner. Reported below: 149 W. Va. 649, 142 S. E. 2d 711.

No. 570. Victoria Mutual Water Co. *v.* Public Utilities Commission of California. Sup. Ct. Cal. Certiorari denied. *Murray M. Chotiner* for petitioner. *Mary Moran Pajalich* for respondent.

No. 575. Keeble *v.* United States. C. A. 8th Cir. Certiorari denied. *Harold Gruenberg* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg* for the United States. Reported below: 347 F. 2d 951.

No. 577. Metal Products Workers Union Local 1645, UAW-AFL-CIO, et al. *v.* Torrington Co. C. A. 2d Cir. Certiorari denied. *Jerome S. Rubenstein* for petitioners. *William J. Larkin II, Jay S. Siegel* and *C. E. Harwood* for respondent. Reported below: 347 F. 2d 93.

No. 578. **Pittman** *v.* **United States.** C. A. 9th Cir. Certiorari denied. *Fred Okrand* for petitioner. *Solicitor General Marshall, Assistant Attorney General Douglas* and *David L. Rose* for the United States. Reported below: 341 F. 2d 739.

No. 580. **California** *v.* **Federal Power Commission**; and

No. 591. **Turlock Irrigation District et al.** *v.* **Federal Power Commission.** C. A. 9th Cir. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, and *J. M. Sanderson,* Deputy Attorney General, for petitioner in No. 580. *Robert L. McCarty* and *Charles F. Wheatley, Jr.,* for petitioners in No. 591. *Solicitor General Marshall, Richard A. Solomon, John C. Mason, Howard E. Wahrenbrock, Joseph B. Hobbs* and *Daniel Goldstein* for respondent. *Robert Matthews,* Attorney General of Kentucky, *Clarence A. H. Meyer,* Attorney General of Nebraska, *Louis J. Lefkowitz,* Attorney General of New York, *Helgi Johanneson,* Attorney General of North Dakota, *Frank L. Farrar,* Attorney General of South Dakota, and *John F. Raper,* Attorney General of Wyoming, filed a brief for their respective States, as *amici curiae,* in support of the petition in No. 591. Reported below: 345 F. 2d 917.

No. 581. **Wolf** *v.* **Blair et al.** C. A. 2d Cir. Certiorari denied. *Paul L. Ross* for petitioner. *Edward N. Sherry* for respondent Curtis Publishing Co. Reported below: 348 F. 2d 994.

No. 587. **Billy Mitchell Village, Inc.** *v.* **New York Life Insurance Co.** Ct. Civ. App. Tex., 11th Sup. Jud. Dist. Certiorari denied. *Al M. Heck* for petitioner. *Edward R. Finck, Jr.,* for respondent. Reported below: 388 S. W. 2d 243.

No. 585. **Hagel** *v.* **Illinois**. Sup. Ct. Ill. Certiorari denied. *Albert E. Jenner, Jr.,* for petitioner. Reported below: 32 Ill. 2d 413, 206 N. E. 2d 699.

No. 586. **Hensel** *v.* **California**. Dist. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 233 Cal. App. 2d 834, 43 Cal. Rptr. 865.

No. 589. **Shapiro & Son Curtain Corp.** *v.* **Glass**. C. A. 2d Cir. Certiorari denied. *Maximilian Bader* and *I. Walton Bader* for petitioner. *Leon Silverman* for respondent. Reported below: 348 F. 2d 460.

No. 592. **Merner Lumber & Hardware Co.** *v.* **National Labor Relations Board**. C. A. 9th Cir. Certiorari denied. *Westerdahl W. Gudmundson* for petitioner. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 345 F. 2d 770.

No. 598. **Brasch** *v.* **State Compensation Insurance Fund et al.** Sup. Ct. Cal. Certiorari denied. Petitioner *pro se*. *T. Groezinger* and *Loton Wells* for respondent State Compensation Insurance Fund.

No. 599. **Ciofalo** *v.* **Board of Regents of the University of the State of New York**. Ct. App. N. Y. Certiorari denied. *Maurice Edelbaum* for petitioner. *Louis J. Lefkowitz,* Attorney General of New York, *Robert L. Harrison,* Assistant Attorney General, and *Ruth Kessler Toch,* Assistant Solicitor General, for respondent.

No. 604. **Tyson** *v.* **Louisiana**. Sup. Ct. La. Certiorari denied. Petitioner *pro se*. *Jack P. F. Gremillion,* Attorney General of Louisiana, and *Ralph L. Roy* for respondent.

No. 602. Rhodes *v.* Edwards et al. Sup. Ct. Neb. Certiorari denied. Reported below: 178 Neb. 757, 135 N. W. 2d 453.

No. 606. Snyder, Executor, et al. *v.* Cottonwood Creek Conservancy District No. 11. Sup. Ct. Okla. Certiorari denied. *Leslie L. Conner* and *James M. Little* for petitioners. Reported below: 405 P. 2d 17.

No. 608. Moran *v.* Penan et al. C. A. 1st Cir. Certiorari denied. Petitioner *pro se. Solicitor General Marshall* for Duff et al., and *Matthew J. Ryan, Jr.*, for Bulkley et al., respondents.

No. 609. Siebring *v.* Hansen et al. C. A. 8th Cir. Certiorari denied. *Robert R. Eidsmoe, Donald H. Zarley* and *Bruce W. McKee* for petitioner. *Phillip H. Smith* and *Ralph F. Merchant* for respondents. Reported below: 346 F. 2d 474.

No. 407. Phelper *v.* Texas. Ct. Crim. App. Tex. Certiorari denied. Mr. Justice Black and Mr. Justice Douglas are of the opinion that certiorari should be granted. *Charles W. Tessmer* and *Emmett Colvin, Jr.*, for petitioner. *Waggoner Carr,* Attorney General of Texas, *Hawthorne Phillips,* First Assistant Attorney General, *T. B. Wright,* Executive Assistant Attorney General, *Howard M. Fender* and *Charles B. Swanner,* Assistant Attorneys General, and *Henry Wade* for respondent. Reported below: 396 S. W. 2d 396.

No. 551. Tracy, Warden *v.* Manduchi. C. A. 3d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. *Wilson Bucher* for petitioner. Respondent *pro se.* Reported below: 350 F. 2d 658.

No. 429. **Maxwell** *v.* **Stephens, Penitentiary Superintendent.** C. A. 8th Cir. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. *Jack Greenberg, James M. Nabrit III, Michael Meltsner, Anthony G. Amsterdam, George Howard, Jr.,* and *Harold B. Anderson* for petitioner. *Bruce Bennett,* Attorney General of Arkansas, and *Jack L. Lessenberry* for respondent. Reported below: 348 F. 2d 325.

No. 600. **Swain** *v.* **Alabama.** Sup. Ct. Ala. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. *Jack Greenberg, James M. Nabrit III, Michael Meltsner, Orzell Billingsley, Jr., Peter A. Hall* and *Anthony G. Amsterdam* for petitioner. *Richmond M. Flowers,* Attorney General of Alabama, and *Leslie Hall,* Assistant Attorney General, for respondent.

No. 521. **Pardo-Bolland** *v.* **United States.** C. A. 2d Cir. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. *Jonathan L. Rosner* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Daniel H. Benson* for the United States. Reported below: 348 F. 2d 316.

No. 574. **Panhandle Eastern Pipe Line Co.** *v.* **Federal Power Commission et al.** C. A. D. C. Cir. Certiorari denied. Mr. Justice White took no part in the consideration or decision of this petition. *Harry S. Littman* and *Melvin Richter* for petitioner. *Solicitor General Marshall* and *Howard E. Wahrenbrock* for respondent Federal Power Commission. Reported below: 121 U. S. App. D. C. 111, 348 F. 2d 340.

No. 582. RANCE ET AL. *v.* SPERRY & HUTCHINSON CO. Sup. Ct. Okla. Certiorari denied. MR. JUSTICE FORTAS took no part in the consideration or decision of this petition. *John H. Cantrell* for petitioners. *Samuel M. Lane, Claus Motulsky* and *G. M. Fuller* for respondent. Reported below: 410 P. 2d 859.

No. 116, Misc. BROOKS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Petitioner *pro se. William G. Clark,* Attorney General of Illinois, and *Richard A. Michael,* Assistant Attorney General, for respondent. Reported below: 32 Ill. 2d 81, 203 N. E. 2d 882.

No. 125, Misc. CALHOUN *v.* PATE, WARDEN. C. A. 7th Cir. Certiorari denied. *Robert Jay Nye* for petitioner. *William G. Clark,* Attorney General of Illinois, *Daniel P. Ward* and *Elmer C. Kissane* for respondent. Reported below: 341 F. 2d 885.

No. 155, Misc. DAVIS *v.* MARYLAND. Ct. App. Md. Certiorari denied. *Raymond S. Smethurst* for petitioner. *Thomas B. Finan,* Attorney General of Maryland, for respondent. Reported below: 237 Md. 97, 205 A. 2d 254.

No. 252, Misc. BROWN *v.* WEST VIRGINIA. Sup. Ct. App. W. Va. Certiorari denied. Petitioner *pro se. C. Donald Robertson,* Attorney General of West Virginia, *Leo Catsonis,* Assistant Attorney General, and *Charles M. Walker* for respondent.

No. 427, Misc. SIBLEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 344 F. 2d 103.

No. 480, Misc. **Palomera *v.* Willingham, Warden.** C. A. 10th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Marshall, Assistant Attorney General Doar, David Rubin* and *Gerald P. Choppin* for respondent. Reported below: 344 F. 2d 937.

No. 516, Misc. **Giuliano *v.* United States.** C. A. 2d Cir. Certiorari denied. *Frances Kahn* for petitioner. *Solicitor General Marshall* for the United States. Reported below: 348 F. 2d 217.

No. 519, Misc. **Kapsalis *v.* United States.** C. A. 7th Cir. Certiorari denied. *Robert L. Day* for petitioner. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 345 F. 2d 392.

No. 559, Misc. **Friedman *v.* United States.** C. A. 8th Cir. Certiorari denied. *Morton N. Wekstein* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Daniel H. Benson* for the United States. Reported below: 347 F. 2d 697.

No. 601, Misc. **Bruchon *v.* United States.** C. A. 2d Cir. Certiorari denied. *Albert J. Krieger* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Daniel H. Benson* for the United States. Reported below: 348 F. 2d 316.

No. 669, Misc. **Collins *v.* Markley, Warden.** C. A. 7th Cir. Certiorari denied. *Sigmund J. Beck* for petitioner. *Solicitor General Marshall* for respondent. Reported below: 346 F. 2d 230.

No. 627, Misc. **Lamma** *v.* **United States.** C. A. 2d Cir. Certiorari denied. *J. Robert Lunney* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson,* and *Philip R. Monahan* for the United States. Reported below: 349 F. 2d 338.

No. 647, Misc. **Tyson** *v.* **New York.** Ct. App. N. Y. Certiorari denied. *Robert M. Hitchcock* for petitioner. *Michael F. Dillon* for respondent.

No. 667, Misc. **Hall** *v.* **United States.** C. A. 2d Cir. Certiorari denied. *Leon B. Polsky* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 348 F. 2d 837.

No. 674, Misc. **Becker** *v.* **Matteawan State Hospital Superintendent et al.** C. A. 2d Cir. Certiorari denied.

No. 699, Misc. **McKinney** *v.* **New York.** App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 23 App. Div. 2d 812, 258 N. Y. S. 2d 316.

No. 712, Misc. **Sims** *v.* **California.** App. Dept., Super. Ct. Cal., County of S. F. Certiorari denied. *Norman Leonard, Benjamin Dreyfus* and *George Martinez* for petitioner.

No. 721, Misc. **Curtis** *v.* **Cobey et al.** C. A. D. C. Cir. Certiorari denied. *Arthur S. Curtis, pro se. J. Joseph Barse* for Cobey, *Frederick A. Ballard* for Western Electric Co., and *Ross O'Donoghue* for Great American Insurance Co., Inc., respondents.

No. 725, Misc. **Kemp** *v.* **Florida.** Dist. Ct. App. Fla., 3d Dist. Certiorari denied. *Marco Loffredo* for petitioner. Reported below: 177 So. 2d 58.

No. 726, Misc. **Carpenter** *v.* **Kansas.** Sup. Ct. Kan. Certiorari denied.

No. 728, Misc. **Bohanon** *v.* **New York Central Railroad Co.** C. A. 7th Cir. Certiorari denied.

No. 768, Misc. **LeVar** *v.* **Arizona.** Sup. Ct. Ariz. Certiorari denied. *Harold R. Scoville* for petitioner. *Darrell F. Smith,* Attorney General of Arizona, *William E. Eubank,* Chief Assistant Attorney General, and *Gary K. Nelson,* Assistant Attorney General, for respondent. Reported below: 98 Ariz. 217, 403 P. 2d 532.

No. 812, Misc. **McNally et al.** *v.* **Connecticut.** Sup. Ct. Err. Conn. Certiorari denied. *Harry H. Hefferan, Jr.,* and *Irwin Friedman* for petitioners. *John F. McGowan* for respondent. Reported below: 152 Conn. 598, 211 A. 2d 162.

No. 310, Misc. **Barnard** *v.* **United States;**
No. 345, Misc. **Lassiter** *v.* **United States;** and
No. 346, Misc. **Knippel** *v.* **United States.** C. A. 9th Cir. Certiorari denied. The Chief Justice and Mr. Justice Fortas are of the opinion that certiorari should be granted. *Peter A. Schwabe, Jr.,* for petitioners. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 342 F. 2d 309.

No. 739, Misc. **Robinson** *v.* **Minnesota.** Sup. Ct. Minn. Certiorari denied. Reported below: 271 Minn. 477, 136 N. W. 2d 401.

No. 733, Misc. **Millwood** *v.* **California et al.** C. A. 9th Cir. Certiorari denied.

No. 412, Misc. **Price et al.** *v.* **United States.** C. A. 2d Cir. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. *Leon B. Polsky* for petitioners. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 345 F. 2d 256.

Rehearing Denied.

No. 384. **Stebbins** *v.* **Macy, Chairman, U. S. Civil Service Commission, et al.,** *ante,* p. 41;

No. 488. **Hullum, Administratrix** *v.* **St. Louis Southwestern Railway Co.,** *ante,* p. 906;

No. 94, Misc. **Sten** *v.* **United States,** *ante,* p. 854;

No. 366, Misc. **Starnes** *v.* **Markley, Warden,** *ante,* p. 908;

No. 439, Misc. **Grimes** *v.* **Crouse, Warden,** *ante,* p. 882;

No. 485, Misc. **Finfer** *v.* **Cohen, Commissioner of Internal Revenue,** *ante,* p. 883;

No. 508, Misc. **Groza** *v.* **Lemmon et al.,** *ante,* p. 895; and

No. 520, Misc. **Carter et al.** *v.* **United States,** *ante,* p. 888. Petitions for rehearing denied.

No. 163. **Lynch** *v.* **Industrial Indemnity Co. et al.,** *ante,* p. 844. Motion to dispense with printing the petition for rehearing granted. Petition for rehearing denied.

No. 413. **Pollack et al.** *v.* **Commissioner of Patents,** *ante,* p. 893. Petition for rehearing denied. Mr. Justice Fortas took no part in the consideration or decision of this petition.

Assignment Order.

An order of The Chief Justice designating and assigning Mr. Justice Reed (retired) to perform judicial duties in the United States Court of Appeals for the District of Columbia Circuit beginning December 1, 1965, and ending January 31, 1966, and for such further time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

DECEMBER 13, 1965.

Dismissal Under Rule 60.

No. 569. Bache et al. *v.* Engelmohr. Sup. Ct. Wash. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. *Lucien F. Marion* for petitioners. *Edward J. Ennis* and *Jerome Shulkin* for respondent. Reported below: 66 Wash. 2d 103, 401 P. 2d 346.

Miscellaneous Orders.

No. 26, Original. Louisiana *v.* Katzenbach, Attorney General. Motions for extension of time for argument in No. 22, Original, *South Carolina* v. *Katzenbach, Attorney General,* and for leave to file a bill of complaint are denied. *Jack P. F. Gremillion,* Attorney General of Louisiana, *Harry J. Kron, Jr.,* Assistant Attorney General, and *Sidney W. Provensal, Jr.,* on the motion. *Solicitor General Marshall* for defendant in opposition.

No. 5, Misc. Edmonson *v.* Nash, Warden. Motion for leave to file petition for writ of habeas corpus denied. Petitioner *pro se.* *Norman H. Anderson,* Attorney General of Missouri, and *William A. Peterson* and *Howard L. McFadden,* Assistant Attorneys General, for respondent.

No. 42. GINZBURG ET AL. *v.* UNITED STATES. C. A. 3d Cir. (Certiorari granted, *ante,* p. 803);

No. 49. MISHKIN *v.* NEW YORK. Appeal from Ct. App. N. Y. (Probable jurisdiction noted, 380 U. S. 960); and

No. 368. A BOOK NAMED "JOHN CLELAND'S MEMOIRS OF A WOMAN OF PLEASURE" *v.* ATTORNEY GENERAL OF MASSACHUSETTS. Appeal from Sup. Jud. Ct. Mass. (Probable jurisdiction noted, *ante,* p. 900.) Motions of the American Parents Committee, Inc., and the Committee of Religious Leaders of the City of New York for leave to appear, as *amici curiae,* and to adopt as their briefs the briefs *amicus curiae* filed by the Citizens for Decent Literature, Inc., are granted. *Charles H. Keating, Jr.,* and *James J. Clancy* on the motions.

No. 48. HARPER ET AL. *v.* VIRGINIA BOARD OF ELECTIONS ET AL. Appeal from D. C. E. D. Va. (Probable jurisdiction noted, 380 U. S. 930.) Motion of the Solicitor General for leave to participate in oral argument, as *amicus curiae,* granted and thirty minutes are allotted for that purpose. Counsel for appellees are allotted an additional thirty minutes for oral argument. *Solicitor General Marshall* on the motion.

No. 490. SHEPPARD *v.* MAXWELL, WARDEN. C. A. 6th Cir. (Certiorari granted, *ante,* p. 916.) Motion to dispense with the printing of the record granted. *F. Lee Bailey* on the motion.

No. 54, Misc. RUBIO *v.* WILSON, WARDEN, ET AL. Motion for leave to file petition for writ of habeas corpus denied. Petitioner *pro se.* *Thomas C. Lynch,* Attorney General of California, *Albert W. Harris, Jr.,* Assistant Attorney General, and *Clifton R. Jeffers,* Deputy Attorney General, for respondents.

No. 584. CALIFORNIA *v.* STEWART. Sup. Ct. Cal. (Certiorari granted, *ante,* p. 937.) Motion of respondent for the appointment of counsel granted, and it is ordered that *William A. Norris, Esquire,* of Los Angeles, California, a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for the respondent in this case.

No. 183, Misc. ARANDA *v.* CALIFORNIA;
No. 618, Misc. SANTOS *v.* WILSON;
No. 661, Misc. COLE *v.* RUSSELL, CORRECTIONAL SUPERINTENDENT; and
No. 684, Misc. THOMPSON *v.* MACIEISKI, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 93, Misc. STANLEY *v.* FLORIDA. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for writ of certiorari, certiorari is denied. Petitioner *pro se.* *Earl Faircloth,* Attorney General of Florida, and *William D. Roth,* Assistant Attorney General, for respondent.

No. 100, Misc. BOAN *v.* IDAHO. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for writ of certiorari, certiorari is denied. Petitioner *pro se.* *Allan G. Shepard,* Attorney General of Idaho, and *Thomas G. Nelson,* Deputy Attorney General, for respondent.

No. 174, Misc. MAISONAVE *v.* FLORIDA;
No. 207, Misc. WESTMORE *v.* FLORIDA; and
No. 825, Misc. SMITH *v.* FLORIDA. Motions for leave to file petitions for writs of habeas corpus denied. Treating the papers submitted as petitions for writs of certiorari, certiorari is denied.

No. 384, Misc. COOPER *v.* FLORIDA. Motion for leave to file petition for writ of habeas corpus denied. Petitioner *pro se. Earl Faircloth,* Attorney General of Florida, and *William D. Roth,* Assistant Attorney General, for respondent.

No. 613, Misc. RICHARDSON *v.* MISSOURI;
No. 673, Misc. HURLEY *v.* UNITED STATES; and
No. 703, Misc. BARNES *v.* MISSOURI. Motions for leave to file petitions for writs of mandamus denied.

Probable Jurisdiction Noted.

No. 256. UNITED STATES *v.* COOK. Appeal from D. C. M. D. Tenn. Motion to dispense with printing the motion to dismiss or affirm granted. Probable jurisdiction noted. *Solicitor General Cox, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Jerome M. Feit* for the United States.

Certiorari Granted. (See also No. 523, *ante,* p. 283; No. 610, *ante,* p. 285; No. 11, Misc., *ante,* p. 286; and No. 281, Misc., *ante,* p. 286.)

No. 636. SECURITIES AND EXCHANGE COMMISSION *v.* NEW ENGLAND ELECTRIC SYSTEM ET AL. C. A. 1st Cir. Certiorari granted. *Solicitor General Marshall, Philip A. Loomis, Jr., David Ferber* and *Aaron Levy* for petitioner. *John R. Quarles* for respondents. Reported below: 346 F. 2d 399.

No. 37, Misc. DAVIS *v.* NORTH CAROLINA. C. A. 4th Cir. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari granted. The case is transferred to the appellate docket. *Conrad O. Pearson* for petitioner. *T. W. Bruton,* Attorney General of North Carolina, and *James F. Bullock,* Assistant Attorney General, for respondent. Reported below: 339 F. 2d 770.

Certiorari Denied. (See also Nos. 557 and 654, *ante*, p. 283; and Misc. Nos. 93, 100, 174, 207 and 825, *supra.*)

No. 90. JORDAN *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. *Sam J. D'Amico* for petitioner. *Jack P. F. Gremillion,* Attorney General of Louisiana, and *Ralph L. Roy* for respondent. Reported below: 247 La. 367, 171 So. 2d 650.

No. 92. GHARIBIANS *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of L. A. Certiorari denied. *David Arthur Binder* for petitioner.

No. 111. ACCARDI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Jerome Lewis* for petitioner. *Solicitor General Cox, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 342 F. 2d 697.

No. 121. BRACER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Abraham Glasser* for petitioner. *Solicitor General Cox, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 342 F. 2d 522.

No. 312. HUSK *v.* BUCHANAN, SHERIFF. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. *Milton M. Ferrell* for petitioner. *Earl Faircloth,* Attorney General of Florida, *Herbert P. Benn,* Assistant Attorney General, and *Ellen J. Morphonios* for respondent. Reported below: 167 So. 2d 38.

No. 436. TIESI *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. *David Perskie* for petitioner. *Arthur J. Sills,* Attorney General of New Jersey, and *John W. Hayden, Jr.,* Deputy Attorney General, for respondent.

No. 305. **Derfus** *v.* **California.** Dist. Ct. App. Cal., 2d App. Dist. Certiorari denied. *Hyman Gold* for petitioner.

No. 343. **Cudia et al.** *v.* **United States.** C. A. 7th Cir. Certiorari denied. *John R. Snively* for petitioners. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 346 F. 2d 227.

No. 496. **Heaps** *v.* **California.** App. Dept., Super. Ct. Cal., County of L. A. Certiorari denied. *Stephen A. Pace, Jr.,* and *Thomas W. Cochran* for petitioner.

No. 503. **Winter** *v.* **United States.** C. A. 2d Cir. Certiorari denied. *Jerome Lewis* and *Thomas R. Newman* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Philip R. Monahan* for the United States. Reported below: 348 F. 2d 204.

No. 534. **Battaglia** *v.* **United States.** C. A. 9th Cir. Certiorari denied. *Russell E. Parsons* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Jerome M. Feit,* for the United States. Reported below: 349 F. 2d 556.

No. 540. **Wiesner** *v.* **Maryland.** Cir. Ct. for Baltimore County, Md. Certiorari denied. *L. Robert Evans* for petitioner.

No. 613. **Danforth Foundation** *v.* **United States.** C. A. 8th Cir. Certiorari denied. *Albert E. Jenner, Jr.,* for petitioner. *Solicitor General Marshall, Acting Assistant Attorney General Roberts, Morton K. Rothschild* and *Robert A. Bernstein* for the United States. Reported below: 347 F. 2d 673.

No. 564. **Duriron Co., Inc.** *v.* **Stephenson et al.** Sup. Ct. Alaska. Certiorari denied. *P. Eugene Smith, Laidler B. Mackall* and *John E. Nolan, Jr.*, for petitioner. *Theodore Stevens* for respondent Stephenson. Reported below: 401 P. 2d 423.

No. 607. **Andrews** *v.* **United States**;

No. 703. **Postell et al.** *v.* **United States**;

No. 706. **Andrews et al.** *v.* **United States**; and

No. 707. **Owens et al.** *v.* **United States.** C. A. 6th Cir. Certiorari denied. *Jacob Kossman* for petitioner in No. 607. *Thomas D. Hirschfeld* for petitioners in No. 703. *Walter S. Houston* and *Eugene Smith* for petitioners in No. 706. Petitioners *pro se* in No. 707. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Daniel H. Benson* for the United States. Reported below: 347 F. 2d 207.

No. 615. **Dietz** *v.* **City of Toledo.** Sup. Ct. Ohio. Certiorari denied. *Merritt W. Green II* for petitioner. *John A. DeVictor, Jr.*, and *John J. Burkhart* for respondent. Reported below: 3 Ohio St. 2d 30, 209 N. E. 2d 127.

No. 620. **Luros et al.** *v.* **Hanson, U. S. District Judge, et al.** C. A. 8th Cir. Certiorari denied. *Stanley Fleishman* and *Sam Rosenwein* for petitioners. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Jerome M. Feit* for respondents.

No. 621. **Hill** *v.* **United States et al.** C. A. 9th Cir. Certiorari denied. *James O. Hewitt* for petitioner. *Solicitor General Marshall, Acting Assistant Attorney General Roberts* and *Joseph M. Howard* for the United States et al. Reported below: 346 F. 2d 175.

No. 616. Easter *v.* Ziff et al. Ct. App. Md. Certiorari denied.

No. 624. Creamer Industries, Inc. *v.* United States et al. C. A. 5th Cir. Certiorari denied. *R. B. Cannon* for petitioner. *Solicitor General Marshall, Acting Assistant Attorney General Roberts* and *Joseph Kovner* for the United States et al. Reported below: 349 F. 2d 625.

No. 627. Phipps *v.* Ohio. Sup. Ct. Ohio. Certiorari denied. *Earl W. Allison* for petitioner. *Everett Burton* for respondent.

No. 628. Moorman, Administrator, et al. *v.* Austin Presbyterian Theological Seminary et al. Sup. Ct. Tex. Certiorari denied. *Hume Cofer* and *John D. Cofer* for petitioners. *William B. Carssow* for respondents. Reported below: 391 S. W. 2d 717.

No. 629. Stein et al. *v.* Oshinsky, Principal, Public School 184, Whitestone, New York, et al. C. A. 2d Cir. Certiorari denied. *Edward J. Bazarian* and *Thomas J. Ford* for petitioners. *Leo A. Larkin, Seymour B. Quel, Benjamin Offner* and *Sidney P. Nadel* for Oshinsky et al., and *Charles A. Brind* for Board of Regents, respondents. Reported below: 348 F. 2d 999.

No. 630. Idaho Power Co. *v.* Federal Power Commission. C. A. 9th Cir. Certiorari denied. *R. P. Parry* and *A. C. Inman* for petitioner. *Solicitor General Marshall, Richard A. Solomon* and *Howard E. Wahrenbrock* for respondent. Reported below: 346 F. 2d 956.

No. 631. Merrick *v.* Allstate Insurance Co. C. A. 8th Cir. Certiorari denied. *Jerome J. Duff* for petitioner. *John S. Marsalek* for respondent. Reported below: 349 F. 2d 279.

No. 727. Ivy *v.* Katzenbach, Attorney General, et al. C. A. 7th Cir. Certiorari denied. *Leonard R. Hartenfeld* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Donald I. Bierman* for respondents. Reported below: 351 F. 2d 32.

No. 618. Winckler & Smith Citrus Products Co. et al. *v.* Sunkist Growers, Inc., et al. C. A. 9th Cir. Motion to dispense with printing the petition for writ of certiorari granted. Certiorari denied. Mr. Justice Fortas took no part in the consideration or decision of this motion and petition. *Bernard Reich* for petitioners. *Ross C. Fisher* and *Herman F. Selvin* for respondents. Reported below: 346 F. 2d 1012.

No. 622. Pacific Coast European Conference et al. *v.* United States et al. C. A. 9th Cir. Motion of Dow Chemical Co. et al. to be added as parties respondent granted. Certiorari denied. *Robert L. Harmon* for petitioners. *Solicitor General Marshall, Assistant Attorney General Turner, Irwin A. Seibel, Milan C. Miskovsky* and *Walter H. Mayo III* for the United States et al. Reported below: 350 F. 2d 197.

No. 625. Auerbach et al. *v.* United States. C. A. 5th Cir. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. *Joseph J. Lyman* for petitioners. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 347 F. 2d 742.

No. 38, Misc. Conway *v.* Virginia. Cir. Ct. Arlington County, Va. Certiorari denied. *Francis G. Molinaro* for petitioner.

No. 634. Foremost Dairies, Inc. *v.* Federal Trade Commission. C. A. 5th Cir. Certiorari denied. Mr. Justice Fortas took no part in the consideration or decision of this petition. *Edgar E. Barton, George W. Milam* and *Macdonald Flinn* for petitioner. *Solicitor General Marshall, Assistant Attorney General Turner, Lionel Kestenbaum, Jerry Z. Pruzansky* and *James McI. Henderson* for respondent. Reported below: 348 F. 2d 674.

No. 726. Giancana *v.* United States. C. A. 7th Cir. Motion to stay execution of commitment for contempt and petition for writ of certiorari denied. *Edward Bennett Williams* and *Richard E. Gorman* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 352 F. 2d 921.

No. 10, Misc. Law *v.* Texas. Ct. Crim. App. Tex. Certiorari denied. *Weldon Funderburk* for petitioner. *Waggoner Carr,* Attorney General of Texas, and *Hawthorne Phillips, Stanton Stone, Howard M. Fender* and *Allo B. Crow, Jr.,* Assistant Attorneys General, for respondent.

No. 14, Misc. Perry *v.* United States. C. A. D. C. Cir. Certiorari denied. *Richard T. Conway* for petitioner. *Solicitor General Cox, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 121 U. S. App. D. C. 29, 347 F. 2d 813.

No. 30, Misc. Miller *v.* New Mexico. Sup. Ct. N. M. Certiorari denied. Petitioner *pro se. Boston E. Witt,* Attorney General of New Mexico, and *Thomas O. Olson,* Special Assistant Attorney General, for respondent.

No. 25, Misc. LOVE *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied.

No. 35, Misc. MENACHO *v.* CALIFORNIA ET AL. Sup. Ct. Cal. Certiorari denied. Petitioner *pro se. Thomas C. Lynch,* Attorney General of California, *John T. Murphy,* Deputy Attorney General, *Arlo E. Smith,* Chief Assistant Attorney General, and *Albert W. Harris, Jr.,* Assistant Attorney General, for respondents.

No. 40, Misc. BURNS *v.* HARRIS, WARDEN. C. A. 8th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Doar* and *Harold H. Greene* for respondent. Reported below: 340 F. 2d 383.

No. 65, Misc. MCDONALD *v.* RHAY, PENITENTIARY SUPERINTENDENT. Sup. Ct. Wash. Certiorari denied. Petitioner *pro se. John J. O'Connell,* Attorney General of Washington, and *Stephen C. Way,* Assistant Attorney General, for respondent.

No. 69, Misc. SNIPE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Theodore Wieseman* for the United States. Reported below: 343 F. 2d 25.

No. 72, Misc. SEGARS *v.* BOMAR, WARDEN. C. A. 6th Cir. Certiorari denied. Petitioner *pro se. George F. McCanless,* Attorney General of Tennessee, and *Henry C. Foutch,* Assistant Attorney General, for respondent.

No. 105, Misc. BERTRAND *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Petitioner *pro se. Jack P. F. Gremillion,* Attorney General of Louisiana, for respondent.

No. 52, Misc. Tillett *v.* Missouri. Sup. Ct. Mo. Certiorari denied.

No. 75, Misc. Smith *v.* Illinois. Sup. Ct. Ill. Certiorari denied. Petitioner *pro se*. *William G. Clark*, Attorney General of Illinois, and *Richard A. Michael*, Assistant Attorney General, for respondent.

No. 107, Misc. Draper et al. *v.* Washington et al. Sup. Ct. Wash. Certiorari denied. Petitioners *pro se*. *George A. Kain* for respondents. Reported below: 65 Wash. 2d 303, 396 P. 2d 990.

No. 124, Misc. Davis *v.* Wilson, Warden, et al. Sup. Ct. Cal. Certiorari denied. Petitioner *pro se*. *Thomas C. Lynch*, Attorney General of California, and *Robert R. Granucci* and *Charles W. Rumph*, Deputy Attorneys General, for respondents.

No. 211, Misc. Syverson *v.* United States. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 342 F. 2d 780.

No. 233, Misc. Robins *v.* Texas. Ct. Crim. App. Tex. Certiorari denied. *William E. Gray* for petitioner. *Waggoner Carr*, Attorney General of Texas, *Hawthorne Phillips, T. B. Wright, Howard M. Fender* and *Gilbert J. Pena*, Assistant Attorneys General, for respondent.

No. 255, Misc. Williams *v.* Tennessee. Sup. Ct. Tenn. Certiorari denied. Petitioner *pro se*. *George F. McCanless*, Attorney General of Tennessee, and *Edgar P. Calhoun*, Assistant Attorney General, for respondent. Reported below: — Tenn. —, 390 S. W. 2d 234.

No. 234, Misc. **Reynolds** *v.* **Langlois, Warden.** Sup. Ct. R. I. Certiorari denied. Reported below: — R. I. —, 209 A. 2d 237.

No. 269, Misc. **Brown** *v.* **Brough, Warden.** Ct. App. Md. Certiorari denied.

No. 299, Misc. **Williams** *v.* **United States.** C. A. D. C. Cir. Certiorari denied. *Bruce E. Clubb* for petitioner. *Solicitor General Cox, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Ronald L. Gainer* for the United States. Reported below: 120 U. S. App. D. C. 244, 345 F. 2d 733.

No. 315, Misc. **Meyes** *v.* **California.** Sup. Ct. Cal. Certiorari denied.

No. 323, Misc. **Green** *v.* **New York.** App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. *David J. Mountan, Jr.,* for petitioner. *Aaron E. Koota* and *Frank Di Lalla* for respondent.

No. 324, Misc. **Woodson** *v.* **Iowa.** C. A. 8th Cir. Certiorari denied.

No. 353, Misc. **Rhodes** *v.* **Tinsley, Warden.** C. A. 10th Cir. Certiorari denied. Petitioner *pro se. Duke W. Dunbar,* Attorney General of Colorado, *Frank E. Hickey,* Deputy Attorney General, and *John E. Bush,* Assistant Attorney General, for respondent. Reported below: 343 F. 2d 135.

No. 359, Misc. **Irving** *v.* **California.** Sup. Ct. Cal. Certiorari denied.

No. 363, Misc. **Tillman** *v.* **California.** Sup. Ct. Cal. Certiorari denied.

No. 350, Misc. **Young** *v.* **Washington.** Sup. Ct. Wash. Certiorari denied. Reported below: 65 Wash. 2d 938, 400 P. 2d 374.

No. 403, Misc. **Postell** *v.* **California.** Sup. Ct. Cal. Certiorari denied.

No. 435, Misc. **Bailey** *v.* **Rhay, Penitentiary Superintendent.** Sup. Ct. Wash. Certiorari denied.

No. 456, Misc. **Wright** *v.* **Rhay, Penitentiary Superintendent.** Sup. Ct. Wash. Certiorari denied.

No. 491, Misc. **Barnosky** *v.* **Maroney, Correctional Superintendent.** C. A. 3d Cir. Certiorari denied.

No. 496, Misc. **White** *v.* **Grant, U. S. District Judge.** C. A. 7th Cir. Certiorari denied.

No. 497, Misc. **Williams** *v.* **Florida.** Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 174 So. 2d 97.

No. 506, Misc. **Brooks** *v.* **United States.** C. A. 2d Cir. Certiorari denied. Petitioner *pro se. Acting Solicitor General Spritzer, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 518, Misc. **Birdsell** *v.* **United States.** C. A. 5th Cir. Certiorari denied. *O. Don Chapoton* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 346 F. 2d 775.

No. 534, Misc. **Stahlman** *v.* **Rhay, Penitentiary Superintendent.** Sup. Ct. Wash. Certiorari denied.

No. 548, Misc. WILLIAMS *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. *Jacob Wysoker* for petitioner.

No. 571, Misc. YOUNG *v.* WEST VIRGINIA. Sup. Ct. App. W. Va. Certiorari denied.

No. 600, Misc. NOONKESTER *v.* WASHINGTON ET AL. Sup. Ct. Wash. Certiorari denied.

No. 607, Misc. WILLIAMS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States. Reported below: 342 F. 2d 425.

No. 614, Misc. FENTON *v.* HEINZE, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 616, Misc. WHITE *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 637, Misc. ATKINS *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 195 Kan. 182, 403 P. 2d 962.

No. 638, Misc. NELSON *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 346 F. 2d 73.

No. 654, Misc. GLOVER *v.* LAVALLEE, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 656, Misc. SALAZAR *v.* COX, WARDEN; and
No. 657, Misc. LUCERO *v.* COX, WARDEN. Sup. Ct. N. M. Certiorari denied.

No. 658, Misc. BATES *v.* WILSON, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 691, Misc. ARMENTA *v.* DUNBAR, CORRECTIONS DIRECTOR. Sup. Ct. Cal. Certiorari denied.

No. 692, Misc. MAGETTE *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Petitioner *pro se.* *Frank S. Hogan* and *H. Richard Uviller* for respondent.

No. 693, Misc. HURLEY *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Daniel H. Benson* for the United States.

No. 695, Misc. LYONS ET AL. *v.* BAILEY, DIRECTOR, JUVENILE COURT FACILITIES. Sup. Ct. Cal. Certiorari denied.

No. 697, Misc. BOWDEN *v.* CALIFORNIA ADULT AUTHORITY ET AL. Sup. Ct. Cal. Certiorari denied.

No. 698, Misc. SANCHEZ *v.* COX, WARDEN. Sup. Ct. N. M. Certiorari denied.

No. 702, Misc. CAGLE *v.* HARRIS, WARDEN. C. A. 8th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Marshall, Assistant Attorney General Doar* and *David L. Norman* for respondent. Reported below: 349 F. 2d 404.

No. 704, Misc. LITTERIO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Marshall* for the United States.

No. 708, Misc. VANHOOK *v.* EKLUND, PRISON SUPERINTENDENT. C. A. 9th Cir. Certiorari denied. Reported below: 348 F. 2d 920.

No. 729, Misc. **Peguese** *v.* **Fay, Warden.** C. A. 2d Cir. Certiorari denied.

No. 734, Misc. **Ross** *v.* **Delta Drilling Co.** C. A. 5th Cir. Certiorari denied.

No. 737, Misc. **De Lucia** *v.* **Yeager, Warden.** C. A. 3d Cir. Certiorari denied. Reported below: 346 F. 2d 569.

No. 763, Misc. **Shields** *v.* **Missouri.** Sup. Ct. Mo. Certiorari denied. *Julian C. Jaeckel* for petitioner. Reported below: 391 S. W. 2d 909.

No. 780, Misc. **Puckett** *v.* **Tennessee.** Sup. Ct. Tenn. Certiorari denied. Petitioner *pro se. George F. McCanless,* Attorney General of Tennessee, and *Edgar P. Calhoun,* Assistant Attorney General, for respondent.

No. 786, Misc. **Matlock** *v.* **United States.** C. A. 6th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 350 F. 2d 261.

No. 801, Misc. **Corcoran** *v.* **Yorty et al.** C. A. 9th Cir. Certiorari denied. Petitioner *pro se. Roger Arnebergh* and *Bourke Jones* for respondents. Reported below: 347 F. 2d 222.

Rehearing Denied.

No. 533, Misc. **Clark** *v.* **Illinois,** *ante,* p. 910. Petition for rehearing denied.

No. 281. **Shakespeare et al.** *v.* **City of Pasadena,** *ante,* p. 39. Motion to dispense with printing petition for rehearing granted. Petition for rehearing denied.

JANUARY 5, 1966.

Dismissal Under Rule 60.

No. 637. JAHNCKE SERVICE, INC., ET AL. *v.* GREATER NEW ORLEANS EXPRESSWAY COMMISSION ET AL. C. A. 5th Cir. Petition for writ of certiorari as to petitioner Home Insurance Co. dismissed pursuant to Rule 60 of the Rules of this Court. *Eberhard P. Deutsch* and *René H. Himel, Jr.*, for petitioners. *George B. Matthews* for respondent Greater New Orleans Expressway Commission. Reported below: 341 F. 2d 956.

JANUARY 17, 1966.

Dismissal Under Rule 60.

No. 1039, Misc. WELLS *v.* WASHINGTON. Sup. Ct. Wash. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court.

Miscellaneous Orders.

No. 22, Original. SOUTH CAROLINA *v.* KATZENBACH, ATTORNEY GENERAL. (Motion for leave to file bill of complaint granted, *ante*, p. 898.) Motion by the State of Alabama for leave to intervene denied. *Francis J. Mizell, Jr.*, and *Reid B. Barnes* on the motion.

No. 210. STEVENS *v.* MARKS, NEW YORK SUPREME COURT JUSTICE. App. Div., Sup. Ct. N. Y., 1st Jud. Dept.; and

No. 290. STEVENS *v.* McCLOSKEY, SHERIFF. C. A. 2d Cir. (Certiorari granted, *ante*, p. 809.) Motion of Superior Officers Council of City of New York Police Department for leave to file brief, as *amicus curiae*, granted. *Abraham Glasser* on the motion. *Frank S. Hogan* and *H. Richard Uviller* for respondents in both cases in opposition.

No. 219. BAXSTROM *v.* HEROLD, STATE HOSPITAL DIRECTOR. Ct. App. N. Y. (Certiorari granted, 381 U. S. 949.) Motion of respondent for leave to file brief after argument granted. *Louis J. Lefkowitz,* Attorney General of New York, *Ruth Kessler Toch,* Acting Solicitor General, and *Anthony J. Lokot,* Assistant Attorney General, on the motion.

No. 368. A BOOK NAMED "JOHN CLELAND'S MEMOIRS OF A WOMAN OF PLEASURE" *v.* ATTORNEY GENERAL OF MASSACHUSETTS. Appeal from Sup. Jud. Ct. Mass. (Probable jurisdiction noted, *ante,* p. 900.) Motion for leave to file supplemental brief by Citizens for Decent Literature, Inc., as *amicus curiae,* denied. *Charles J. Keating, Jr.,* and *James J. Clancy* on the motion. *Charles Rembar* for appellant in opposition.

No. 535. UNITED STATES *v.* CATTO ET AL. C. A. 5th Cir. (Certiorari granted, *ante,* p. 925.) Motions of respondents to remove case from summary calendar granted and a total of one and one-half hours is allotted for oral argument. *Ben F. Foster* for Catto et al., and *Claiborne B. Gregory* for Wardlaw et al., respondents, on the motions.

No. 657. BROOKHART *v.* OHIO. Sup. Ct. Ohio. (Certiorari granted, *ante,* p. 810.) Motion of petitioner to substitute Martin A. Janis, Director of the Ohio Department of Mental Hygiene and Correction, as party respondent in place of the State of Ohio granted. *Lawrence Herman* on the motion.

No. 711. UNITED STATES *v.* KALISHMAN, TRUSTEE IN BANKRUPTCY. C. A. 8th Cir. The respondent is invited to file a brief expressing his views, as *amicus curiae,* in No. 650.

No. 584. CALIFORNIA *v.* STEWART. Sup. Ct. Cal. (Certiorari granted, *ante,* p. 937.) Motion of petitioner to dispense with printing the record granted. Motion of respondent for leave to proceed *in forma pauperis* granted. Motion of petitioner to remove case from summary calendar granted and a total of one and one-half hours is allotted for oral argument. *Thomas C. Lynch,* Attorney General of California, and *Gordon Ringer,* Deputy Attorney General, for petitioner. *William A. Norris* for respondent.

No. 722. BARRIOS ET AL. *v.* FLORIDA. Appeal from Sup. Ct. Fla. The Solicitor General is invited to file a brief expressing the views of the United States.

No. 761. WESTOVER *v.* UNITED STATES. C. A. 9th Cir. (Certiorari granted, *ante,* p. 924.) Motion for leave to amend the petition denied.

No. 813, Misc. EVANS *v.* KENNEDY, ATTORNEY GENERAL, ET AL. Motion for leave to file petition for writ of certiorari denied. Petitioner *pro se. Solicitor General Marshall* for respondents. Reported below: 343 F. 2d 913.

No. 805, Misc. CEPHAS *v.* BOLES, WARDEN;
No. 831, Misc. WHITTINGTON *v.* WEAKLEY, REFORMATORY SUPERINTENDENT;
No. 876, Misc. WILLIAMS *v.* FOLLETTE, WARDEN;
No. 891, Misc. MADDEN *v.* CALIFORNIA;
No. 897, Misc. TYNAN *v.* EYMAN, WARDEN, ET AL.;
No. 911, Misc. EARNSHAW *v.* KATZENBACH, ATTORNEY GENERAL, ET AL.; and
No. 925, Misc. ORTEGA *v.* WARDEN, MICHIGAN STATE PRISON. Motions for leave to file petitions for writs of habeas corpus denied.

No. 593, Misc. Murray *v.* Florida. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for writ of certiorari, certiorari is denied. Petitioner *pro se.* *Earl Faircloth,* Attorney General of Florida, and *George R. Georgieff,* Assistant Attorney General, for respondent.

No. 778, Misc. Truslow *v.* Boles, Warden; and

No. 895, Misc. Sheftic *v.* Boles, Warden. Motions for leave to file petitions for writs of habeas corpus denied. Treating the papers submitted as petitions for writs of certiorari, certiorari is denied.

Probable Jurisdiction Noted or Postponed.

No. 79. Cascade Natural Gas Corp. *v.* El Paso Natural Gas Co. et al.;

No. 82. California *v.* El Paso Natural Gas Co. et al.; and

No. 596. Southern California Edison Co. *v.* El Paso Natural Gas Co. et al. Appeals from D. C. Utah. Probable jurisdiction noted. The cases are consolidated and a total of two hours is allotted for oral argument. Mr. Justice White and Mr. Justice Fortas took no part in the consideration or decision of these cases. *H. B. Jones, Jr.,* for appellant in No. 79. *William M. Bennett* for appellant in No. 82. *Rollin E. Woodbury, Harry W. Sturges, Jr., William E. Marx* and *Raymond T. Senior* for appellant in No. 596. *Gregory A. Harrison, Atherton Phleger* and *Leon M. Payne* for El Paso Natural Gas Co., appellee in all cases. Former *Solicitor General Cox, Assistant Attorney General Orrick, Lionel Kestenbaum* and *Donald L. Hardison* for the United States, appellee in Nos. 79 and 82; and *Solicitor General Marshall, Assistant Attorney General Turner* and *Lionel Kestenbaum* for the United States, appellee in No. 596.

No. 531. United States *v.* Blue. Appeal from D. C. S. D. Cal. Further consideration of the question of jurisdiction in this case postponed to the hearing of the case on the merits. *Solicitor General Marshall, Acting Assistant Attorney General Roberts* and *Joseph M. Howard* for the United States. *Ernest R. Mortenson* for appellee.

Certiorari Granted. (See also No. 87, *ante,* p. 366; No. 100, *ante,* p. 367; No. 593, *ante,* p. 362; and No. 663, *ante,* p. 374.)

No. 471. City of Greenwood *v.* Peacock et al.; and
No. 649. Peacock et al. *v.* City of Greenwood. C. A. 5th Cir. Certiorari granted. The cases are consolidated and a total of two hours is allotted for oral argument. The cases are set for oral argument immediately following No. 147. *Aubrey H. Bell* for petitioner in No. 471 and for respondent in No. 649. *Benjamin E. Smith* and *Claudia Shropshire* for petitioners in No. 649 and for respondents in No. 471. Reported below: 347 F. 2d 679, 986.

No. 619. Ashton *v.* Kentucky. Ct. App. Ky. Certiorari granted. *Ephraim London* and *Dan Jack Combs* for petitioner. *Robert Matthews,* Attorney General of Kentucky, and *John B. Browning,* Assistant Attorney General, for respondent.

No. 650. Nicholas, Trustee *v.* United States. C. A. 5th Cir. Certiorari granted. *John H. Gunn* for petitioner. *Solicitor General Marshall, Acting Assistant Attorney General Roberts* and *I. Henry Kutz* for the United States. Reported below: 346 F. 2d 32.

No. 658. Schmerber *v.* California. App. Dept., Super. Ct. Cal., County of L. A. Certiorari granted. *Thomas M. McGurrin* for petitioner. *Roger Arnebergh, Philip E. Grey* and *Wm. E. Doran* for respondent.

No. 645. UNITED STATES *v.* EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES. Sup. Ct. N. J. Certiorari granted. *Solicitor General Marshall, Acting Assistant Attorney General Roberts, Joseph Kovner* and *George F. Lynch* for the United States. Reported below: 45 N. J. 206, 212 A. 2d 25.

No. 692. PURE OIL CO. *v.* SUAREZ. C. A. 5th Cir. Certiorari granted. *Eberhard P. Deutsch, René H. Himel, Jr.,* and *Joaquin Campoy* for petitioner. *Arthur Roth, S. Eldridge Sampliner* and *Charlotte J. Roth* for respondent. Reported below: 346 F. 2d 890.

Certiorari Denied. (See also No. 679, *ante,* p. 366; No. 690, *ante,* p. 367; No. 699, *ante,* p. 371; No. 732, *ante,* p. 370; and Misc. Nos. 593, 778 and 895, *supra.*)

No. 70. AIRCRAFT & ENGINE MAINTENANCE & OVERHAUL, BUILDING, CONSTRUCTION, MANUFACTURING, PROCESSING & DISTRIBUTION & ALLIED INDUSTRIES EMPLOYEES, LOCAL 290, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA *v.* I. E. SCHILLING CO., INC. C. A. 5th Cir. Certiorari denied. *David Previant, L. N. D. Wells, Jr.,* and *Charles J. Morris* for petitioner. *John Bacheller, Jr.,* for respondent. Reported below: 340 F. 2d 286.

No. 86. AIRCRAFT & ENGINE MAINTENANCE & OVERHAUL, BUILDING, CONSTRUCTION, MANUFACTURING, PROCESSING & DISTRIBUTION & ALLIED INDUSTRIES EMPLOYEES, LOCAL 290, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA *v.* OOLITE CONCRETE CO. C. A. 5th Cir. Certiorari denied. *David Previant, L. N. D. Wells, Jr.,* and *Charles J. Morris* for petitioner. *John Bacheller, Jr.,* for respondent. Reported below: 341 F. 2d 210.

No. 245. Bloombaum *v.* Maryland. Ct. App. Md. Certiorari denied. *Joseph S. Kaufman* for petitioner. *Thomas B. Finan,* Attorney General of Maryland, and *Robert F. Sweeney,* Assistant Attorney General, for respondent. Reported below: 237 Md. 663, 207 A. 2d 651.

No. 601. Goodyear Tire & Rubber Co. et al. *v.* Commissioner of Patents. C. A. D. C. Cir. Certiorari denied. *Francis C. Browne* for petitioners. *Solicitor General Marshall, Assistant Attorney General Douglas, David L. Rose* and *Frederick B. Abramson* for respondent. Reported below: 121 U. S. App. D. C. 275, 349 F. 2d 710.

No. 617. Borst *v.* Brenner, Commissioner of Patents. C. C. P. A. Certiorari denied. *Richard Whiting* for petitioner. *Solicitor General Marshall, Assistant Attorney General Douglas, Morton Hollander* and *Edward Berlin* for respondent. Reported below: 52 C. C. P. A. (Pat.) 554, 345 F. 2d 851.

No. 623. Georgia Railroad & Banking Co. *v.* United States. C. A. 5th Cir. Certiorari denied. *Paul R. Russell* and *William J. Cooney* for petitioner. *Solicitor General Marshall* and *Acting Assistant Attorney General Roberts* for the United States. Reported below: 348 F. 2d 278.

No. 632. Scalza *v.* United States; and

No. 701. Hyman *v.* United States. C. A. 2d Cir. Certiorari denied. *Richard Lipsitz* and *Eugene Gressman* for petitioner in No. 632. *Sidney O. Raphael* for petitioner in No. 701. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg, Kirby W. Patterson* and *Mervyn Hamburg* for the United States. Reported below: 350 F. 2d 171.

No. 637. **Jahncke Service, Inc.** *v.* **Greater New Orleans Expressway Commission et al.** C. A. 5th Cir. Certiorari denied. *Eberhard P. Deutsch* and *René H. Himel, Jr.,* for petitioner. *George B. Matthews* for respondent Greater New Orleans Expressway Commission. Reported below: 341 F. 2d 956.

No. 638. **Standard-Triumph Motor Co., Inc.** *v.* **City of Houston et al.** C. A. 5th Cir. Certiorari denied. *Joyce Cox* for petitioner. *John Wildenthal, Jr.,* and *Homer T. Bouldin* for respondents. Reported below: 347 F. 2d 194.

No. 639. **Broadnax** *v.* **United States.** C. A. 6th Cir. Certiorari denied. *James A. Jameson* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 346 F. 2d 119.

No. 640. **Midwest Laundry Equipment Corp.** *v.* **Berg et ux.** Sup. Ct. Neb. Certiorari denied. *Joseph E. Dean, Jr.,* for petitioner. Reported below: 178 Neb. 770, 135 N. W. 2d 457.

No. 641. **Automation Devices, Inc.** *v.* **Smalenberger, dba Automatic Feeder Co.** C. A. 7th Cir. Certiorari denied. *Jack E. Dominik* for petitioner. *Warren C. Horton* for respondent. Reported below: 346 F. 2d 288.

No. 644. **Heider et al.** *v.* **United States.** C. A. 9th Cir. Certiorari denied. *William E. Dougherty* for petitioners. *Solicitor General Marshall, Acting Assistant Attorney General Roberts, Joseph M. Howard* and *John P. Burke* for the United States. Reported below: 347 F. 2d 695.

No. 646. Adams et al. *v.* United States. C. A. 5th Cir. Certiorari denied. *Chris Dixie, David E. Feller* and *Jerry D. Anker* for petitioners. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg* for the United States. Reported below: 347 F. 2d 665.

No. 648. Grant *v.* New York. Ct. App. N. Y. Certiorari denied. *Max J. Rubin* for petitioner. *Frank S. Hogan* and *H. Richard Uviller* for respondent.

No. 651. Montana Eastern Pipe Line Co. *v.* Shell Oil Co. et al. C. A. 9th Cir. Certiorari denied. *Daryl E. Engebregson* for petitioner. *J. T. Lamb* for respondents.

No. 653. Rahmoeller *v.* California. App. Dept., Super. Ct. Cal., County of L. A. Certiorari denied. *Ernest George Williams* for petitioner.

No. 660. Jones, Administrator *v.* United States. Ct. Cl. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States.

No. 664. Lillo et al. *v.* United States. C. A. 3d Cir. Certiorari denied. *Frederic C. Ritger, Jr.*, for petitioners. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Ronald L. Gainer* for the United States.

No. 666. J. C. Martin Corp. *v.* Federal Trade Commission. C. A. 3d Cir. Certiorari denied. *Miles Warner* and *Walter D. Hansen* for petitioner. *Solicitor General Marshall, Assistant Attorney General Turner, Robert B. Hummel* and *James McI. Henderson* for respondent. Reported below: 346 F. 2d 147.

No. 665. **Rudick *v.* Superior Court of California for the County of Los Angeles et al.** Dist. Ct. App. Cal., 2d App. Dist. Certiorari denied. *Phill Silver* for petitioner.

No. 667. **Katschke et al. *v.* United States.** C. A. 7th Cir. Certiorari denied. *Maurice J. Walsh* and *Edward J. Calihan, Jr.,* for petitioners. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Donald I. Bierman* for the United States. Reported below: 350 F. 2d 587.

No. 668. **Watson *v.* United States.** C. A. 5th Cir. Certiorari denied. *Jacob Rassner* for petitioner. *Solicitor General Marshall* for the United States. Reported below: 346 F. 2d 52.

No. 669. **Ritacco et al. *v.* United States.** C. A. 8th Cir. Certiorari denied. *Paul A. Skjervold* for petitioners. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 349 F. 2d 907.

No. 670. **Tecon Engineers, Inc., et al. *v.* United States.** Ct. Cl. Certiorari denied. *William C. Battle* and *James E. Fahey* for petitioners. *Solicitor General Marshall, Acting Assistant Attorney General Roberts* and *Philip R. Miller* for the United States. Reported below: 170 Ct. Cl. 389, 343 F. 2d 943.

No. 685. **Pinedo *v.* United States.** C. A. 9th Cir. Certiorari denied. *Morris Lavine* for petitioner. *Solicitor General Marshall, Acting Assistant Attorney General Roberts, Joseph M. Howard* and *John M. Brant* for the United States. Reported below: 347 F. 2d 142.

No. 671. NORTH TEXAS PRODUCERS ASSOCIATION *v.* METZGER DAIRIES, INC. C. A. 5th Cir. Certiorari denied. *Ashton Phelps* for petitioner. *Charles P. Storey* for respondent. Reported below: 348 F. 2d 189.

No. 672. FIELDSMITH *v.* TEXAS STATE BOARD OF DENTAL EXAMINERS. Ct. Civ. App. Tex., 5th Sup. Jud. Dist. Certiorari denied. *Curtis E. Hill* for petitioner. Reported below: 386 S. W. 2d 305.

No. 674. HULSENBUSCH *v.* DAVIDSON RUBBER CO. C. A. 8th Cir. Certiorari denied. *Victor W. Klein* for petitioner. *Robert B. Russell* for respondent. Reported below: 344 F. 2d 730.

No. 683. TEXAS LIQUOR CONTROL BOARD ET AL. *v.* AMMEX WAREHOUSE CO., INC., ET AL. Ct. Civ. App. Tex., 3d Sup. Jud. Dist. Certiorari denied. *Waggoner Carr,* Attorney General of Texas, *Howard M. Fender,* Assistant Attorney General, and *J. Sam Winters* for petitioners. *Dean Moorhead* for respondents. Reported below: 384 S. W. 2d 768.

No. 687. CHANDLER ET AL. *v.* DAVID ET AL. C. A. 5th Cir. Certiorari denied. *Ashley Sellers, John D. Conner* and *George C. Davis* for petitioners. *Solicitor General Marshall, Assistant Attorney General Douglas, Alan S. Rosenthal* and *Edward Berlin* for respondents. Reported below: 350 F. 2d 669.

No. 686. MELCHER ET AL. *v.* RIDDELL, DISTRICT DIRECTOR OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. *Jerome B. Rosenthal* and *Harland N. Green* for petitioners. *Solicitor General Marshall, Acting Assistant Attorney General Roberts* and *Harold C. Wilkenfeld* for respondent. Reported below: 350 F. 2d 291.

No. 680. ANDREWS *v.* CITY OF SAN BERNARDINO ET AL. Dist Ct. App. Cal., 4th App. Dist. Certiorari denied. *Manuel Ruiz* for petitioner. *Waldo Willhoft* for respondents.

No. 675. STEVENS, EXECUTRIX, ET AL. *v.* HUMBLE OIL & REFINING CO. C. A. 5th Cir. Certiorari denied. *Arthur C. Reuter* and *Herbert J. Garon* for petitioners. Reported below: 346 F. 2d 43.

No. 689. MANHATTAN-BRONX POSTAL UNION ET AL. *v.* O'BRIEN, POSTMASTER GENERAL. C. A. D. C. Cir. Certiorari denied. *Roy C. Frank* for petitioners. *Solicitor General Marshall, Assistant Attorney General Douglas, Morton Hollander* and *Robert V. Zener* for respondent. Reported below: 121 U. S. App. D. C. 321, 350 F. 2d 451.

No. 693. MOORE *v.* P. W. PUBLISHING CO., INC. Sup. Ct. Ohio. Certiorari denied. *James R. Hinton* for petitioner. *W. Howard Fort* for respondent. Reported below: 3 Ohio St. 2d 183, 209 N. E. 2d 412.

No. 696. DILLON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Robert S. Miller* for petitioner. *Solicitor General Marshall, Assistant Attorney General Douglas, Morton Hollander* and *Robert V. Zener* for the United States. Reported below: 346 F. 2d 633.

No. 710. CONTINENTAL GRAIN CO. *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. *Arthur A. Goldsmith* and *Dwight L. Schwab* for petitioner. *John J. O'Connell,* Attorney General of Washington, and *James A. Furber* and *Henry W. Wager,* Assistant Attorneys General, for respondent. Reported below: 66 Wash. 2d 194, 401 P. 2d 870.

No. 697. CARPENTER BODY WORKS, INC. *v.* MCCULLEY ET AL. Ct. Civ. App. Tex., 1st Sup. Jud. Dist. Certiorari denied. *Wiley B. Thomas, Jr.,* for petitioner. *Leland B. Kee* for respondents. Reported below: 389 S. W. 2d 331.

No. 708. AETNA INSURANCE CO. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *James M. Marsh* and *J. Harry LaBrum* for petitioner. *Solicitor General Marshall* and *Acting Assistant Attorney General Roberts* for the United States. Reported below: 346 F. 2d 985.

No. 713. WINDHAM CREAMERY, INC., ET AL. *v.* FREEMAN, SECRETARY OF AGRICULTURE. C. A. 3d Cir. Certiorari denied. *Edward W. Currie* for petitioners. *Solicitor General Marshall, Assistant Attorney General Douglas, Alan S. Rosenthal* and *Frederick B. Abramson* for respondent. Reported below: 350 F. 2d 978.

No. 714. PAGE, GUARDIAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Paul N. Cotro-Manes* for petitioner. *Solicitor General Marshall, Assistant Attorney Douglas* and *Alan S. Rosenthal* for the United States. Reported below: 350 F. 2d 28.

No. 715. ST. LOUIS MAILERS' UNION LOCAL NO. 3 *v.* GLOBE-DEMOCRAT PUBLISHING CO. C. A. 8th Cir. Certiorari denied. *Jerome J. Duff* for petitioner. *Lon Hocker* for respondent. Reported below: 350 F. 2d 879.

No. 728. HENNINGER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Edward S. Barlock* and *Walter L. Gerash* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 350 F. 2d 849.

No. 716. **Schatten-Cypress Co.** *v.* **Lee Shops, Inc.** C. A. 6th Cir. Certiorari denied. *Thomas Wardlaw Steele* and *Cecil Sims* for petitioner. *Maclin P. Davis, Jr.*, for respondent. Reported below: 350 F. 2d 12.

No. 717. **Walston** *v.* **Lambertsen.** C. A. 9th Cir. Certiorari denied. *John W. Riley* for petitioner. *Robert V. Holland* for respondent. Reported below: 349 F. 2d 660.

No. 720. **Rollins** *v.* **Pennsylvania Railroad Co.** Super. Ct. N. J. Certiorari denied. *Francis Sorin* for petitioner. *Francis X. Kennelly* for respondent.

No. 721. **DeRosa** *v.* **Aetna Insurance Co.** C. A. 7th Cir. Certiorari denied. *John G. Phillips* for petitioner. *Peter Fitzpatrick* for respondent. Reported below: 346 F. 2d 245.

No. 723. **Kountis** *v.* **United States.** C. A. 7th Cir. Certiorari denied. *Daniel C. Ahern* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Ronald L. Gainer* for the United States. Reported below: 350 F. 2d 869.

No. 725. **Schwartz** *v.* **New York.** App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. *Edward Brodsky* for petitioner. *Louis J. Lefkowitz,* Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, *David Clurman* and *Alan L. Kazlow,* Special Assistant Attorneys General, and *Barry Mahoney,* Assistant Attorney General, for respondent.

No. 729. **Coe** *v.* **Helmerich & Payne, Inc.** C. A. 10th Cir. Certiorari denied. *Joseph P. Jenkins* for petitioner. *J. D. Lysaught* for respondent. Reported below: 348 F. 2d 1.

No. 730. Smayda et al. *v.* United States. C. A. 9th Cir. Certiorari denied. *Evander C. Smith* for petitioners. *Solicitor General Marshall, Assistant Attorney General Vinson, Robert S. Erdahl* and *Daniel H. Benson* for the United States. Reported below: 352 F. 2d 251.

No. 731. Harrigan et al. *v.* Hamm, Commissioner of Revenue of Alabama. Sup. Ct. Ala. Certiorari denied. *Charles B. Arendall, Jr.,* and *M. Roland Nachman, Jr.,* for petitioners. *Richmond Flowers,* Attorney General of Alabama, and *Willard W. Livingston* and *Herbert I. Burson, Jr.,* Assistant Attorneys General, for respondent. Reported below: 278 Ala. 521, 179 So. 2d 154.

No. 737. Carroll et al. *v.* United States District Court for the Northern District of California et al. C. A. 9th Cir. Certiorari denied. *Sidney Gordon* for petitioners. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for the National Labor Relations Board. *Francis Heisler* for certain real parties in interest. *Richard Ernst* for Pacific Maritime Association.

No. 738. Cherrin Corp. *v.* National Labor Relations Board. C. A. 6th Cir. Certiorari denied. *Marvin W. Cherrin* for petitioner. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 349 F. 2d 1001.

No. 739. Gibraltor Amusements, Ltd. *v.* Wurlitzer Co. et al. C. A. 2d Cir. Certiorari denied. *Frances Mechta* for petitioner. *Edward R. Neaher* for Wurlitzer Co. et al., and *Joseph Jaspan* for Christ, Trustee, respondents.

No. 736. REPUBLIC OF IRAQ *v.* FIRST NATIONAL BANK OF CHICAGO. C. A. 7th Cir. Certiorari denied. *Carl L. Shipley* for petitioner. Reported below: 350 F. 2d 645.

No. 740. ABBAMONTE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Irwin Klein* for petitioner. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 348 F. 2d 700.

No. 742. CITY OF CLEVELAND *v.* PUBLIC UTILITIES COMMISSION OF OHIO ET AL. Sup. Ct. Ohio. Certiorari denied. *William T. McKnight* and *James L. Harkens, Jr.,* for petitioner. *William Saxbe,* Attorney General of Ohio, and *Theodore K. High,* Assistant Attorney General, for Public Utilities Commission of Ohio, and *John Lansdale* for Cleveland Electric Illuminating Co., respondents. Reported below: 3 Ohio St. 2d 82, 209 N. E. 2d 424.

No. 744. AMERICAN COMPRESS WAREHOUSE, DIVISION OF FROST-WHITED CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. *Thomas E. Shroyer* for petitioner. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli, Norton J. Come* and *Herman M. Levy* for respondent. Reported below: 350 F. 2d 365.

No. 749. SUN OIL CO. *v.* FEDERAL TRADE COMMISSION. C. A. 7th Cir. Certiorari denied. *Leonard J. Emmerglick, Henry A. Frye* and *Richard L. Freeman* for petitioner. *Solicitor General Marshall, Assistant Attorney General Turner, Robert B. Hummel, James McI. Henderson* and *Alvin L. Berman* for respondent. Reported below: 350 F. 2d 624.

No. 745. MOSKOW ET AL. *v.* BOSTON REDEVELOPMENT AUTHORITY ET AL. Sup. Jud. Ct. Mass. Certiorari denied. *James W. Kelleher* and *Edgar L. Kelley* for petitioners. *Lewis H. Weinstein* and *Loyd M. Starrett* for Boston Redevelopment Authority; *William H. Kerr* for the City of Boston et al.; *Edward W. Brooke,* Attorney General of Massachusetts, and *David Berman,* Assistant Attorney General, for the Director of the Division of Urban Renewal; and *Richard Wait* for New England Merchants National Bank of Boston et al., respondents. Reported below: 349 Mass. 553, 210 N. E. 2d 699.

No. 746. RAINEY ET AL. *v.* GEORGE A. FULLER CO. ET AL. Sup. Ct. Cal. Certiorari denied. *Phill Silver* for petitioners.

No. 747. MACK *v.* BRENNER, COMMISSIONER OF PATENTS. C. C. P. A. Certiorari denied. *Henry Gifford Hardy* for petitioner. *Solicitor General Marshall, Assistant Attorney General Douglas, Alan S. Rosenthal* and *Harvey L. Zuckman* for respondent. Reported below: 52 C. C. P. A. (Pat.) 394, 344 F. 2d 719.

No. 748. BERNER ET AL., EXECUTORS *v.* BRITISH COMMONWEALTH PACIFIC AIRLINES, LTD., ET AL. C. A. 2d Cir. Certiorari denied. *T. Roland Berner, M. Victor Leventritt* and *Aaron Lewittes* for petitioners. *Austin P. Magner* and *George N. Tompkins, Jr.,* for respondents. Reported below: 346 F. 2d 532.

No. 756. DAVID ET UX. *v.* PHINNEY, DISTRICT DIRECTOR OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. *Fentress Bracewell* and *John M. Robinson* for petitioners. *Solicitor General Marshall* and *Acting Assistant Attorney General Roberts* for respondent. Reported below: 350 F. 2d 371.

No. 753. 93 **Court Corp. et al.** *v.* **United States.** C. A. 2d Cir. Certiorari denied. *Albert Foreman* for petitioners. *Acting Solicitor General Spritzer, Assistant Attorney General Douglas* and *David L. Rose* for the United States. Reported below: 350 F. 2d 386.

No. 757. **Goranson, Administrator** *v.* **Capital Airlines, Inc., et al.** C. A. 6th Cir. Certiorari denied. *Fred A. Smith* for petitioner. *Wayne E. Stichter* for respondents. Reported below: 345 F. 2d 750.

No. 771. **Bates** *v.* **United States.** C. A. 9th Cir. Certiorari denied. *Raymond E. Sutton* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg* for the United States. Reported below: 352 F. 2d 399.

No. 774. **World Airways, Inc.** *v.* **Northeast Airlines, Inc.** C. A. 1st Cir. Certiorari denied. *Jerrold Scoutt, Jr.,* and *Raymond J. Rasenberger* for petitioner. *Laurence S. Fordham* for respondent. Reported below: 349 F. 2d 1007.

No. 780. **Releford** *v.* **United States.** C. A. 6th Cir. Certiorari denied. *John F. Dugger* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 352 F. 2d 36.

No. 787. **Bank of America National Trust & Savings Association** *v.* **Federal Reserve Bank of San Francisco.** C. A. 9th Cir. Certiorari denied. *Robert H. Fabian* and *Harris B. Taylor* for petitioner. *Solicitor General Marshall, Assistant Attorney General Douglas, Morton Hollander* and *Richard S. Salzman* for respondent. Reported below: 349 F. 2d 565.

No. 769. CALIFORNIA Co. *v.* KUCHENIG. C. A. 5th Cir. Certiorari denied. *Lawrence K. Benson* for petitioner. Reported below: 350 F. 2d 551.

No. 790. SIGNAL MANUFACTURING Co. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 1st Cir. Certiorari denied. *Maurice Epstein* for petitioner. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli, Norton J. Come* and *Warren M. Davison* for respondent. Reported below: 351 F. 2d 471.

No. 798. KING *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Orie Seltzer* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg* for the United States.

No. 34. FRANKEL ET AL. *v.* FEDERAL POWER COMMISSION ET AL.;

No. 35. J. RAY MCDERMOTT & Co., INC. *v.* FEDERAL POWER COMMISSION ET AL.; and

No. 36. SUPERIOR OIL Co. *v.* FEDERAL POWER COMMISSION ET AL. C. A. 5th Cir. Motion of United Gas Pipe Line Co. to be added as a party respondent in No. 36 granted. Certiorari denied. MR. JUSTICE FORTAS took no part in the consideration or decision of this motion and these petitions. *H. H. Hillyer, Jr.*, for petitioners in Nos. 34 and 35. *Murray Christian, Herbert W. Varner* and *R. B. Voight* for petitioner in No. 36. *Solicitor General Cox, Richard A. Solomon, Howard A. Wahrenbrock* and *Josephine H. Klein* for the Federal Power Commission, respondent in all cases. *Kent H. Brown* and *Morton L. Simons* for Public Service Commission of New York, respondent in Nos. 34 and 35. *Vernon W. Woods* and *Saunders Gregg* for United Gas Pipe Line Co., respondent in No. 36. Reported below: 335 F. 2d 1004.

No. 800. Mobil Oil Co. *v.* Local 7–644, Oil, Chemical & Atomic Workers International Union, AFL–CIO. C. A. 7th Cir. Certiorari denied. *William H. Armstrong* and *Robert L. Broderick* for petitioner. *Harold Gruenberg* for respondent. Reported below: 350 F. 2d 708.

No. 355. Littell *v.* Nakai. C. A. 9th Cir. Motion to dispense with printing respondent's brief granted. Certiorari denied. *Frederick Bernays Wiener* and *John F. Doyle* for petitioner. *Harold E. Mott* for respondent. *Solicitor General Marshall* for the United States, as *amicus curiae,* in opposition. Reported below: 344 F. 2d 486.

No. 566. Hooper *v.* United States. C. A. 6th Cir. Motion for leave to file a supplement to the petition granted. Motion to dispense with printing petition granted. Certiorari denied. *Charles Orlando Pratt* and *Hamilton W. Kenner* for petitioner. *Solicitor General Marshall* and *Charles J. McCarthy* for the United States.

No. 603. England et ux. *v.* United States. C. A. 7th Cir. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. *Ernest Rubenstein* for petitioners. *Solicitor General Marshall, Acting Assistant Attorney General Roberts* and *I. Henry Kutz* for the United States. Briefs of *amici curiae,* in support of the petition, were filed by *Graham W. McGowan* for the Electronic Industries Association; by *John R. Turney, Jr.,* for the Manufacturing Chemists' Association, Inc.; by *George R. Fearon* and *Richard B. Barker* for the Associated Industries of New York State, Inc.; and by *Lambert H. Miller* for the National Association of Manufacturers of the United States. Reported below: 345 F. 2d 414.

No. 643. THOMPSON *v.* KAWASAKI KISEN, K. K., ET AL. C. A. 1st Cir. Motion of the American Trial Lawyers Association for leave to file brief, as *amicus curiae,* granted. Certiorari denied. *Eugene X. Giroux* for petitioner. *Seymour P. Edgerton* for Kawasaki Kisen, K. K., and *C. Keefe Hurley* for Bay State Stevedoring Co., respondents. *Harvey Goldstein* for American Trial Lawyers Association, as *amicus curiae,* in support of the petition. Reported below: 348 F. 2d 879.

No. 647. SOUTH FLORIDA TELEVISION CORP. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE FORTAS took no part in the consideration or decision of this petition. *Scott W. Lucas* and *Joseph B. Friedman* for petitioner. *Solicitor General Marshall, Assistant Attorney General Turner, Lionel Kestenbaum* and *Henry Geller* for Federal Communications Commission, and *Robert A. Marmet, Edwin R. Schneider, Jr., Paul A. Porter* and *Reed Miller* for L. B. Wilson, Inc., respondents. Reported below: 121 U. S. App. D. C. 293, 349 F. 2d 971.

No. 691. LIGGETT & MYERS TOBACCO CO. *v.* PRITCHARD, ADMINISTRATRIX. C. A. 3d Cir. Certiorari denied. MR. JUSTICE FORTAS took no part in the consideration or decision of this petition. *Bethuel M. Webster, Donald J. Cohn, William H. Eckert* and *Francis K. Decker, Jr.,* for petitioner. *James E. McLaughlin* and *Charles Alan Wright* for respondent. Reported below: 350 F. 2d 479.

No. 735. GAMBLE-SKOGMO, INC. *v.* WESTERN AUTO SUPPLY CO. ET AL. C. A. 8th Cir. Certiorari denied. MR. JUSTICE FORTAS took no part in the consideration or decision of this petition. *Edward J. Callahan* for petitioner. *Hayner N. Larson* for respondents. Reported below: 348 F. 2d 736.

No. 682. Overlakes Corp. *v.* Commissioner of Internal Revenue. C. A. 2d Cir. Certiorari denied. Mr. Justice Brennan took no part in the consideration or decision of this petition. *William L. Hanaway* and *Thomas R. Moore* for petitioner. *Acting Solicitor General Spritzer, Acting Assistant Attorney General Roberts, Harry Baum* and *Loring W. Post* for respondent. Reported below: 348 F. 2d 462.

No. 688. Griffith et al. *v.* Board of Commissioners of the Alabama State Bar. Sup. Ct. Ala. Certiorari denied. Mr. Justice Black is of the opinion that certiorari should be granted. *Fred Blanton, Jr.,* for petitioners. *M. Ronald Nachman, Jr.,* for respondent. Reported below: 278 Ala. 330, 178 So. 2d 156; 278 Ala. 344, 178 So. 2d 169.

No. 755. Frazier *v.* California. Dist. Ct. App. Cal., 4th App. Dist. Certiorari denied. Mr. Justice Black is of the opinion that certiorari should be granted. *George Kaufmann* for petitioner.

No. 709. Muth, Administratrix *v.* Atlass et al., Executors; and

No. 733. Darr, Administratrix *v.* Atlass et al., Executors. C. A. 7th Cir. Certiorari denied. Mr. Justice Black is of the opinion that certiorari should be granted, the Court of Appeals' judgment reversed, and the District Court's judgment affirmed. *G. Kent Yowell* for petitioner in No. 709. *Harold A. Liebenson* and *Edward G. Raszus* for petitioner in No. 733. *Edward B. Hayes* for respondents in both cases. Reported below: 350 F. 2d 592.

No. 1, Misc. Stello *v.* Pennsylvania. Sup. Ct. Pa. Certiorari denied. Reported below: 415 Pa. 572, 202 A. 2d 71.

No. 741. Gray et al. *v.* California. App. Dept., Super. Ct. Cal., County of L. A. Motion to dispense with printing petition granted. Certiorari denied. *David Arthur Binder* for petitioners. *Roger Arnebergh* and *Philip E. Grey* for respondent.

No. 803. Colorado Milling & Elevator Co. *v.* Terminal Railroad Association of St. Louis. C. A. 8th Cir. Certiorari denied. Mr. Justice White took no part in the consideration or decision of this petition. *George E. Heneghan* for petitioner. *Lyman J. Bishop* for respondent. Reported below: 350 F. 2d 273.

No. 140, Misc. Clark *v.* Wainwright, Corrections Director. Sup. Ct. Fla. Certiorari denied. Petitioner *pro se.* *Earl Faircloth,* Attorney General of Florida, and *John S. Burton,* Assistant Attorney General, for respondent.

No. 148, Misc. Kirk *v.* California. Sup. Ct. Cal. Certiorari denied. Petitioner *pro se.* *Thomas C. Lynch,* Attorney General of California, and *Raymond M. Momboisse* and *Richard K. Turner,* Deputy Attorneys General, for respondent.

No. 221, Misc. Newman *v.* New York. Ct. App. N. Y. Certiorari denied. Petitioner *pro se.* *Louis J. Lefkowitz,* Attorney General of New York, *Ruth Kessler Toch,* Assistant Solicitor General, and *Winifred C. Stanley,* Assistant Attorney General, for respondent.

No. 249, Misc. DeGroat *v.* New York State Supreme Court et al. Ct. App. N. Y. Certiorari denied. Petitioner *pro se.* *Louis J. Lefkowitz,* Attorney General of New York, and *Lester Esterman,* Assistant Attorney General, for respondents.

No. 212, Misc. Sullivan *v.* New Jersey. Sup. Ct. N. J. Certiorari denied. Petitioner *pro se*. *Leo Kaplowitz* and *Ralph de Vita* for respondent.

No. 278, Misc. Bryant *v.* Fay, Warden. Ct. App. N. Y. Certiorari denied. Petitioner *pro se*. *Louis J. Lefkowitz,* Attorney General of New York, and *Frederick E. Weeks, Jr.,* Assistant Attorney General, for respondent.

No. 279, Misc. Amaral *v.* Florida. Sup. Ct. Fla. Certiorari denied. Petitioner *pro se*. *Earl Faircloth,* Attorney General of Florida, and *George R. Georgieff,* Assistant Attorney General, for respondent.

No. 287, Misc. Miller *v.* California et al. Dist. Ct. App. Cal., 2d App. Dist. Certiorari denied. Petitioner *pro se*. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Jack K. Weber,* Deputy Attorney General, for respondents. Reported below: 230 Cal. App. 2d 876, 41 Cal. Rptr. 431.

No. 293, Misc. Beasley *v.* Texas. Ct. Crim. App. Tex. Certiorari denied. *William E. Gray* for petitioner. *Waggoner Carr,* Attorney General of Texas, and *Hawthorne Phillips, T. B. Wright, Howard M. Fender* and *Allo B. Crow, Jr.,* Assistant Attorneys General, for respondent. Reported below: 389 S. W. 2d 299.

No. 297, Misc. Conover *v.* Herold, State Hospital Director. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Louis J. Lefkowitz,* Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Frank J. Pannizzo,* Assistant Attorney General, for respondent.

No. 295, Misc. Armstrong *v.* Alabama. Sup. Ct. Ala. Certiorari denied. Petitioner *pro se. Richmond M. Flowers,* Attorney General of Alabama, and *Leslie Hall* and *W. Mark Anderson III,* Assistant Attorneys General, for respondent.

No. 367, Misc. Savino *v.* New York. Ct. App. N. Y. Certiorari denied. Petitioner *pro se. Aaron E. Koota* and *Frank Di Lalla* for respondent.

No. 373, Misc. Anderson et al. *v.* United States. C. A. 6th Cir. Certiorari denied. Petitioners *pro se. Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 345 F. 2d 28.

No. 428, Misc. Knight *v.* Florida. Sup. Ct. Fla. Certiorari denied. Petitioner *pro se. Earl Faircloth,* Attorney General of Florida, and *John S. Burton,* Assistant Attorney General, for respondent.

No. 442, Misc. Walker *v.* Indiana. Sup. Ct. Ind. Certiorari denied. Petitioner *pro se. John J. Dillon,* Attorney General of Indiana, and *Douglas B. McFadden,* Deputy Attorney General, for respondent. Reported below: — Ind. —, 204 N. E. 2d 850.

No. 460, Misc. Rice *v.* Lane, Warden. Sup. Ct. Ind. Certiorari denied. Petitioner *pro se. John J. Dillon,* Attorney General of Indiana, and *Douglas B. McFadden,* Deputy Attorney General, for respondent.

No. 495, Misc. Rogers *v.* Lane, Warden. C. A. 7th Cir. Certiorari denied. Petitioner *pro se. John J. Dillon,* Attorney General of Indiana, and *Kenneth M. Waterman,* Deputy Attorney General, for respondent. Reported below: 345 F. 2d 357.

No. 478, Misc. WILSON *v.* MARONEY, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. Petitioner *pro se*. *William A. Peiffer* for respondent.

No. 500, Misc. GONZALES *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. *Warren P. McKenney* for petitioner. *Waggoner Carr,* Attorney General of Texas, and *Hawthorne Phillips, T. B. Wright* and *Howard M. Fender,* Assistant Attorneys General, for respondent. Reported below: 389 S. W. 2d 306.

No. 521, Misc. DE MONGE ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Henry F. Lerch* for petitioners. *Solicitor General Marshall* for the United States.

No. 552, Misc. CUNNINGHAM *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Doar* and *David L. Norman* for the United States et al.

No. 573, Misc. QUILES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 344 F. 2d 490.

No. 662, Misc. CLOSE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Lewis T. Booker* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Donald I. Bierman* for the United States. Reported below: 349 F. 2d 841.

No. 679, Misc. DI PIERO *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Petitioner *pro se*. *A. Alfred Delduco* and *John S. Halsted* for respondent.

No. 509, Misc. Reed *v.* United States et al. Sup. Ct. Mo. Certiorari denied.

No. 666, Misc. Lipscomb *v.* Stevens, Warden. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Doar, David L. Norman* and *Gerald P. Choppin* for respondent. Reported below: 349 F. 2d 997.

No. 668, Misc. Trantino *v.* New Jersey. Sup. Ct. N. J. Certiorari denied. *Frances Kahn* for petitioner. *Guy W. Calissi* for respondent. Reported below: 44 N. J. 358, 209 A. 2d 117.

No. 681, Misc. Davis *v.* Dunbar, Corrections Director, et al. Sup. Ct. Cal. Certiorari denied.

No. 683, Misc. Wright *v.* New Jersey. Sup. Ct. N. J. Certiorari denied.

No. 686, Misc. Alexander *v.* United States. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Philip R. Monahan* for the United States. Reported below: 346 F. 2d 561.

No. 687, Misc. Wilson *v.* Maroney, Correctional Superintendent. C. A. 3d Cir. Certiorari denied.

No. 713, Misc. Macias *v.* California. Dist. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 740, Misc. Green et al. *v.* California. App. Dept., Super. Ct. Cal., County of L. A. Certiorari denied. *Laurence R. Sperber, A. L. Wirin* and *Fred Okrand* for petitioners. Reported below: 234 Cal. App. 2d 871, 44 Cal. Rptr. 438.

No. 694, Misc. **Butler** *v.* **Weakley et al.** C. A. 4th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Marshall, Assistant Attorney General Doar* and *David L. Norman* for respondents.

No. 711, Misc. **Beasley** *v.* **Texas Casualty Insurance Co.** Sup. Ct. Tex. Certiorari denied. *Thomas C. Ferguson* for petitioner. *Coleman Gay* for respondent. Reported below: 391 S. W. 2d 33.

No. 727, Misc. **Gallagher** *v.* **California.** Dist. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 746, Misc. **Eldridge** *v.* **United States.** C. A. D. C. Cir. Certiorari denied. *Jean F. Dwyer* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Ronald L. Gainer* for the United States.

No. 750, Misc. **Hunt et al.** *v.* **Nebraska.** Sup. Ct. Neb. Certiorari denied. *Vincent J. Kirby* for petitioners. Reported below: 178 Neb. 783, 135 N. W. 2d 475.

No. 751, Misc. **White** *v.* **California.** Sup. Ct. Cal. Certiorari denied.

No. 754, Misc. **White** *v.* **Clemmons, Sheriff, et al.** C. A. 5th Cir. Certiorari denied. Petitioner *pro se. Jack P. F. Gremillion,* Attorney General of Louisiana, and *Ralph L. Roy* for respondents.

No. 760, Misc. **Flowers** *v.* **United States.** C. A. 10th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Marshall, Assistant Attorney General Douglas* and *David L. Rose* for the United States. Reported below: 348 F. 2d 910.

No. 755, Misc. WARD *v.* PEYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied. Reported below: 349 F. 2d 359.

No. 758, Misc. CURLEY *v.* MCMANN, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 759, Misc. TIMMONS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 120 U. S. App. D. C. 28, 343 F. 2d 310.

No. 761, Misc. LYONS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 762, Misc. REID *v.* CALIFORNIA. Dist. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 233 Cal. App. 2d 163, 43 Cal. Rptr. 379.

No. 764, Misc. ORLANDO *v.* MARONEY, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 769, Misc. BUSH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States. Reported below: 347 F. 2d 231.

No. 770, Misc. TRAGANZA *v.* CALIFORNIA. Dist. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 771, Misc. BENTLEY *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 774, Misc. CARREON *v.* CALIFORNIA. Dist. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 772, Misc. VIDA *v.* ROTH, U. S. DISTRICT JUDGE. C. A. 6th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for respondent.

No. 773, Misc. SKOLNICK *v.* HALLETT ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 350 F. 2d 861.

No. 777, Misc. WILLIAMS *v.* DUNCANSON. C. A. 9th Cir. Certiorari denied.

No. 783, Misc. JOHNSON *v.* RUSSELL, CORRECTIONAL SUPERINTENDENT. Super. Ct. Pa. Certiorari denied.

No. 784, Misc. MOOTS *v.* SECRETARY OF HEALTH, EDUCATION AND WELFARE. C. A. 4th Cir. Certiorari denied. *Samuel Goldblatt* for petitioner. *Solicitor General Marshall* for respondent. Reported below: 349 F. 2d 518.

No. 787, Misc. DRAPER *v.* RHAY, PENITENTIARY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 788, Misc. LOUX *v.* RHAY, PENITENTIARY SUPERINTENDENT. Sup. Ct. Wash. Certiorari denied.

No. 794, Misc. ESKRIDGE *v.* RHAY, PENITENTIARY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied. Reported below: 345 F. 2d 778.

No. 795, Misc. FAIR *v.* BURNS, GOVERNOR OF FLORIDA. Sup. Ct. Fla. Certiorari denied.

No. 796, Misc. CAMPBELL *v.* KERNER, GOVERNOR OF ILLINOIS, ET AL. Sup. Ct. Ill. Certiorari denied.

No. 797, Misc. Rector *v.* Heinze, Warden. Sup. Ct. Cal. Certiorari denied.

No. 798, Misc. Robinson *v.* Fay, Warden. C. A. 2d Cir. Certiorari denied. *Leon B. Polsky* for petitioner. *Louis J. Lefkowitz,* Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Brenda Soloff,* Deputy Assistant Attorney General, for respondent. Reported below: 348 F. 2d 705.

No. 799, Misc. Rivera *v.* Reeves et al. C. A. 2d Cir. Certiorari denied. *Leon B. Polsky* for petitioner.

No. 800, Misc. Byrnes *v.* United States. C. A. 9th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Marshall* for the United States. Reported below: 348 F. 2d 918.

No. 802, Misc. Branch, dba Dream Shell Homes *v.* Mills & Lupton Supply Co., Inc. C. A. 6th Cir. Certiorari denied. *John S. Wrinkle* for petitioner. Reported below: 348 F. 2d 991.

No. 803, Misc. Stiltner *v.* Rhay, Penitentiary Superintendent. Sup. Ct. Wash. Certiorari denied.

No. 807, Misc. Furtak *v.* New York. Ct. App. N. Y. Certiorari denied.

No. 809, Misc. Collins *v.* Klinger, Mens Colony Superintendent. C. A. 9th Cir. Certiorari denied.

No. 810, Misc. Brabson *v.* Wilkins, Warden. C. A. 2d Cir. Certiorari denied.

No. 816, Misc. Ortega *v.* Mississippi. Sup. Ct. Miss. Certiorari denied.

No. 808, Misc. **Russell** *v.* **Maxwell, Warden.** C. A. 6th Cir. Certiorari denied. Reported below: 348 F. 2d 908.

No. 822, Misc. **Hobbs** *v.* **Maryland.** C. A. 4th Cir. Certiorari denied.

No. 826, Misc. **Hensley** *v.* **Kansas.** Sup. Ct. Kan. Certiorari denied.

No. 827, Misc. **Meyes** *v.* **California.** Sup. Ct. Cal. Certiorari denied.

No. 828, Misc. **Robinson** *v.* **New York.** C. A. 2d Cir. Certiorari denied.

No. 830, Misc. **Brown** *v.* **Zuckert, Secretary of the Air Force, et al.** C. A. 7th Cir. Certiorari denied. *Fleetwood M. McCoy, William R. Ming, Jr.,* and *Ellis E. Reid* for petitioner. *Solicitor General Marshall* for respondents. Reported below: 349 F. 2d 461.

No. 832, Misc. **Jefferson** *v.* **McGee et al.** C. A. 9th Cir. Certiorari denied.

No. 835, Misc. **Ross** *v.* **California et al.** Sup. Ct. Cal. Certiorari denied.

No. 839, Misc. **Grenfell** *v.* **Gladden, Warden.** Sup. Ct. Ore. Certiorari denied. Reported below: 241 Ore. 190, 405 P. 2d 532.

No. 843, Misc. **Smith** *v.* **Ellington et al.** C. A. 6th Cir. Certiorari denied. *John S. Wrinkle* for petitioner. *W. D. Spears* for Ellington, and *Richmond M. Flowers,* Attorney General of Alabama, and *Robert P. Bradley,* Assistant Attorney General, for Patterson et al., respondents. Reported below: 348 F. 2d 1021.

No. 845, Misc. CHAPMAN *v.* RUSSELL, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 847, Misc. ANDREWS *v.* MURPHY. C. A. 6th Cir. Certiorari denied. Petitioner *pro se.* *Robert E. Sullivan* for respondent. Reported below: 349 F. 2d 114.

No. 853, Misc. LEE *v.* WILSON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 855, Misc. JOHNSON *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 857, Misc. FIERRO *v.* CALIFORNIA. Dist. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 862, Misc. WYNDER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Roland S. Homet, Jr.,* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 122 U. S. App. D. C. 186, 352 F. 2d 662.

No. 868, Misc. BECKER ET AL. *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of L. A. Certiorari denied. *David Arthur Binder* for petitioners. *Roger Arnebergh* and *Philip E. Grey* for respondent.

No. 15, Misc. HERR ET AL. *v.* UNITED STATES. C. A. 7th Cir. Motion for leave to amend petition for writ of certiorari granted. Certiorari denied. *Daniel W. Gray* for petitioners. *Solicitor General Cox, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Marshall Tamor Golding* for the United States. Reported below: 338 F. 2d 607.

No. 926, Misc. LOSINGER *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied.

No. 815, Misc. CRIDER *v.* ZURICH INSURANCE CO. C. A. 5th Cir. Motion for leave to use the record in No. 116, October Term, 1964, granted. Certiorari denied. *Robert S. Vance* for petitioner. *Foster Etheredge* for respondent. Reported below: 348 F. 2d 211.

Rehearing Denied.

No. 57. HAZELTINE RESEARCH, INC., ET AL. *v.* BRENNER, COMMISSIONER OF PATENTS, *ante*, p. 252;

No. 165. MCMASTER *v.* UNITED STATES, *ante*, p. 818;

No. 166. WOLFF *v.* UNITED STATES, *ante*, p. 818;

No. 227. BULLOCK *v.* VIRGINIA, *ante*, p. 927;

No. 352. LAURITZEN *v.* SPANN, *ante*, p. 938;

No. 359. JOHNSON *v.* UNITED STATES, *ante*, pp. 836, 923;

No. 429. MAXWELL *v.* STEPHENS, PENITENTIARY SUPERINTENDENT, *ante*, p. 944;

No. 519. GISH *v.* MISSOURI, *ante*, p. 919;

No. 523. ALBANESE *v.* N. V. NEDERL. AMERIK STOOMV. MAATS. ET AL., *ante*, p. 283;

No. 539. BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION *v.* UNITED STATES, *ante*, p. 927;

No. 550. PREZIOSO *v.* UNITED STATES, *ante*, p. 939;

No. 552. CHATSWORTH COOPERATIVE MARKETING ASSOCIATION ET AL. *v.* INTERSTATE COMMERCE COMMISSION, *ante*, p. 938;

No. 558. ATLANTIC REFINING CO. *v.* FEDERAL TRADE COMMISSION, *ante*, p. 939;

No. 598. BRASCH *v.* STATE COMPENSATION INSURANCE FUND ET AL., *ante*, p. 942; and

No. 608. MORAN *v.* PENAN ET AL., *ante*, p. 943. Petitions for rehearing denied.

No. 481, October Term, 1963. Viking Theatre Corp. *v.* Paramount Film Distributing Corp. et al., 378 U. S. 123; 379 U. S. 872. Motion for leave to file second petition for rehearing denied. Mr. Justice Douglas and Mr. Justice Fortas took no part in the consideration or decision of this motion.

No. 543, October Term, 1963. United States *v.* Maryland for the use of Meyer et al., *ante,* p. 158. Petition for rehearing denied. Mr. Justice Fortas took no part in the consideration or decision of this petition. [For earlier orders herein, see 375 U. S. 954; 379 U. S. 925.]

No. 4. Leh et al. *v.* General Petroleum Corp. et al., *ante,* p. 54. Petition for rehearing denied. Mr. Justice Harlan and Mr. Justice Fortas took no part in the consideration or decision of this petition.

No. 21. United Gas Improvement Co. et al. *v.* Callery Properties, Inc., et al.;

No. 22. Public Service Commission of New York *v.* Callery Properties, Inc., et al.; and

No. 32. Federal Power Commission *v.* Callery Properties, Inc., et al., *ante,* p. 223. Petition for rehearing of Superior Oil Co. et al. denied. Mr. Justice Fortas took no part in the consideration or decision of this petition.

No. 676, Misc. Walker *v.* Superior Court of California in and for the City and County of San Francisco, *ante,* p. 923. Petition for rehearing denied. The Chief Justice took no part in the consideration or decision of this petition.

No. 501. ROSENBLATT *v.* AMERICAN CYANAMID CO., *ante,* p. 110. Petition for rehearing denied. MR. JUSTICE HARLAN took no part in the consideration or decision of this petition.

No. 125, Misc. CALHOUN *v.* PATE, WARDEN, *ante,* p. 945;

No. 219, Misc. HUGHES ET AL. *v.* KROPP, WARDEN, *ante,* p. 872;

No. 310, Misc. BARNARD *v.* UNITED STATES, *ante,* p. 948;

No. 320, Misc. BRYE *v.* WAINWRIGHT, CORRECTIONS DIRECTOR, *ante,* p. 930;

No. 345, Misc. LASSITER *v.* UNITED STATES, *ante,* p. 948;

No. 346, Misc. KNIPPEL *v.* UNITED STATES, *ante,* p. 948;

No. 592, Misc. MASSARI *v.* UNITED STATES, *ante,* p. 931;

No. 602, Misc. EDELL *v.* DI PIAZZA ET AL., *ante,* p. 931;

No. 617, Misc. GADSDEN ET AL. *v.* FRIPP ET AL., *ante,* p. 921;

No. 637, Misc. ATKINS *v.* KANSAS, *ante,* p. 964;

No. 674, Misc. BECKER *v.* MATTEAWAN STATE HOSPITAL SUPERINTENDENT ET AL., *ante,* p. 947;

No. 801, Misc. CORCORAN *v.* YORTY ET AL., *ante,* p. 966; and

No. 852, Misc. MOODY *v.* UNITED MINE WORKERS LOCAL FOR THE UNITED STATES ET AL., *ante,* p. 285. Petitions for rehearing denied.

No. 477. HAINSWORTH *v.* MARTIN, SECRETARY OF STATE OF TEXAS, ET AL., *ante,* p. 109. Petition for rehearing denied. MR. JUSTICE FORTAS took no part in the consideration or decision of this petition.

No. 513. Harvey *v.* Lyons et al., *ante*, p. 918. Petition for rehearing and for other relief denied.

No. 477, Misc. Goldstein *v.* Washington, *ante*, p. 895;

No. 501, Misc. Acuff *v.* Cook Machinery Co., Inc., *ante*, p. 805; and

No. 532, Misc. Cline *v.* Dunbar, *ante*, p. 804. Motions for leave to file petitions for rehearing denied.

January 21, 1966.

Miscellaneous Order.

No. 1111, Misc. Chandler, U. S. District Judge *v.* Judicial Council of the Tenth Circuit of the United States. Application for stay of order. *Thomas J. Kenan* for petitioner. *Solicitor General Marshall* for respondent.

Petitioner applied to Mr. Justice White, Circuit Justice for the Tenth Circuit, for "Stay of Order of Judicial Council of the Tenth Circuit of the United States" in the above matter, and the application was by him referred to the Court for its consideration and action.

It appearing to the Court from the response of the Solicitor General to the application that the order from which relief is sought is entirely interlocutory in character pending prompt further proceedings inquiring into the administration of Judge Chandler of judicial business in the Western District of Oklahoma, and that at such proceedings Judge Chandler will be permitted to appear before the Council, with counsel, and that after such proceedings the Council will, as soon as possible, undertake to decide what use, if any, should be made of such powers as it may have in the premises, it is hereby ordered that the application for stay be denied pending this contemplated prompt action of the Judicial Council. The Court expresses no opinion concerning the propriety of the interlocutory action taken.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, dissenting.

United States District Judge Stephen S. Chandler here asks for a stay of an "Order" of the Judicial Council of the Tenth Circuit directing that until further order of the Council, Judge Chandler "take no action whatsoever in any case or proceeding now or hereafter pending" in his court, that cases now assigned to him be assigned to other judges, and that no new actions filed be assigned to him. If this order is not stayed and if the Judicial Council has some way to enforce it, the order means that Judge Chandler is completely barred from performing any of his official duties and in effect is removed or ousted from office pending further orders of the Council. The reason given by the Council for this drastic action is that it "finds that Judge Chandler is presently unable, or unwilling, to discharge efficiently the duties of his office . . . ." By refusing to stay the Council's order, the Court necessarily acts on the premise that the Council has a legal right to remove Judge Chandler from office at least temporarily. Though the Court tries to soft-pedal its refusal to stay the order by referring to it as "interlocutory in character," the stark fact which cannot be disguised is that a United States District Judge, duly appointed by the President and approved by the Senate, is with this Court's imprimatur locked out of his office pending "further proceedings" by the Judicial Council. I think the Council is completely without legal authority to issue any such order, either temporary or permanent, with or without a hearing, that no statute purports to authorize it, and that the Constitution forbids it. Nor can the effect of the order be softened by asserting that Judge Chandler will be permitted to have a lawyer represent him before his fellow judges. Assuming that we have jurisdiction to stay an order from a governmental agency that has no power at all to do what this Council has done, I would stay this "Order" *instanter*.

The Council states that its order was made "pursuant to the power and authority vested in the Judicial Council by the Act of June 25, 1948, c. 646, § 332, 62 Stat. 902, 28 U. S. C. § 332." That section so far as relevant reads:

> "Each judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit. The district judges shall promptly carry into effect all orders of the judicial council."

There is no language whatever in this or any other Act which can by any reasonable interpretation be read as giving the Council a power to pass upon the work of district judges, declare them inefficient and strip them of their power to act as judges. The language of Congress indicates a purpose to vest the Judicial Council with limited *administrative* powers; nothing in this language, or the history behind it, indicates that a Council of Circuit Court Judges was to be vested with power to discipline district judges, and in effect remove them from office. This is clearly and simply a proceeding by circuit judges to inquire into the fitness of a district judge to hold his office and to remove him if they so desire. I do not believe Congress could, even if it wished, vest any such power in the circuit judges.

One of the great advances made in the structure of government by our Constitution was its provision for an independent judiciary—for judges who could do their duty as they saw it without having to account to superior court judges or to anyone else except the Senate sitting as a court of impeachment. Article II, § 4, of the Constitution provides that "Officers of the United States," which includes judges, "shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors," and Art. I, §§ 2 and 3, state that impeachment can be instituted only on recommendation of the House of Representatives and that trial can be held only by the Senate. To hold that judges can do what this Judicial Council has tried to do to Judge Chandler here would in my judgment violate the plan of our Constitution to preserve, as far as possible, the liberty of the people by guaranteeing that they have judges wholly independent of the Government or any of its agents with the exception of the United States Congress acting under its limited power of impeachment. We should stop in its infancy, before it has any growth at all, this idea that the United States district judges can be made accountable for their efficiency or lack of it to the judges just over them in the federal judicial system. The only way to do that is to grant this stay and I am in favor of granting it.

JANUARY 24, 1966.

Miscellaneous Orders.

No. 945, Misc. GREEN, DBA JIM GREEN'S TRUCKING CO. *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA. Motion for leave to file petition for writ of certiorari denied. *Thomas S. Tobin* for petitioner. *Mary Moran Pajalich* for respondent.

No. 990, Misc. IN RE TUCKER. Motion for leave to file petition for writ of mandamus denied.

No. 77, Misc. **Garvey** *v.* **Eyman, Warden.** Motion for leave to file petition for writ of habeas corpus denied. Petitioner *pro se.* *Darrell F. Smith,* Attorney General of Arizona, for respondent.

No. 804, Misc. **O'Brien** *v.* **United States**; and
No. 838, Misc. **McGann** *v.* **Richardson, Warden, et al.** Motions for leave to file petitions for writs of habeas corpus denied.

No. 870, Misc. **Williams** *v.* **California.** Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for writ of certiorari, certiorari is denied.

Probable Jurisdiction Noted.

No. 847. **Katzenbach, Attorney General, et al.** *v.* **Morgan et ux.**; and
No. 877. **New York City Board of Elections** *v.* **Morgan et ux.** Appeals from D. C. D. C. Probable jurisdiction noted. The cases are consolidated and a total of two hours is allotted for oral argument. *Solicitor General Marshall* for appellants in No. 847. *Leo A. Larkin* for appellant in No. 877. Reported below: 247 F. Supp. 196.

No. 537, Misc. **Rinaldi** *v.* **Yeager, Warden, et al.** Appeal from D. C. N. J. Motion for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. The case is transferred to the appellate docket. *Donald A. Robinson* for appellant. *Arthur J. Sills,* Attorney General of New Jersey, and *Eugene T. Urbaniak,* Deputy Attorney General, for appellees. Reported below: 238 F. Supp. 960.

No. 673. Cardona *v.* Power et al. Appeal from Ct. App. N. Y. Probable jurisdiction noted. The case is set for oral argument immediately following Nos. 847 and 877. *Paul O'Dwyer* and *W. Bernard Richland* for appellant. *Louis J. Lefkowitz,* Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, *George C. Mantzoros* and *Barry J. Lipson,* Assistant Attorneys General, and *Brenda Soloff,* Deputy Assistant Attorney General, for appellees. Reported below: 16 N. Y. 2d 639, 708, 827, 209 N. E. 2d 119, 556, 210 N. E. 2d 458.

Certiorari Granted. (See also No. 87, Misc., *ante,* p. 420.)

No. 750. Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employees, AFL–CIO, et al. *v.* Florida East Coast Railway Co.;

No. 782. United States *v.* Florida East Coast Railway Co.; and

No. 783. Florida East Coast Railway Co. *v.* United States. C. A. 5th Cir. Certiorari granted. The cases are consolidated and a total of two hours is allotted for oral argument. The United States is to open the argument and direct itself first to issues raised in No. 782. Mr. Justice Fortas took no part in the consideration or decision of these petitions. *Lester P. Schoene, Neal Rutledge* and *Allan Milledge* for petitioners in No. 750. *Solicitor General Marshall, Assistant Attorney General Douglas* and *David L. Rose* for the United States in No. 782. *William B. Devaney* and *George B. Mickum III* for petitioner in No. 783. *Solicitor General Marshall* for the United States in No. 783. Reported below: 348 F. 2d 682.

Certiorari Denied. (See also No. 824, Misc., *ante,* p. 421; No. 849, Misc., *ante,* p. 421; and No. 870, Misc., *supra.*)

No. 269. PORTELLI *v.* NEW YORK; and

No. 270. ROSENBERG *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. *William Sonenshine* for petitioner in No. 269. *Maurice Edelbaum* for petitioner in No. 270. *Aaron E. Koota* and *Aaron Nussbaum* for respondent in both cases. Reported below: 15 N. Y. 2d 235, 205 N. E. 2d 857.

No. 565. MONROE AUTO EQUIPMENT CO. *v.* FEDERAL TRADE COMMISSION. C. A. 7th Cir. Certiorari denied. *Harold T. Halfpenny* and *Mary M. Shaw* for petitioner. *James McI. Henderson* and *Thomas F. Howder* for respondent. *Solicitor General Marshall* and *Assistant Attorney General Turner* for the United States, as *amicus curiae.* Reported below: 347 F. 2d 401.

No. 661. FIELD ENTERPRISES, INC. *v.* UNITED STATES. Ct. Cl. Certiorari denied. *James B. Lewis* and *Alan N. Cohen* for petitioner. *Solicitor General Marshall, Acting Assistant Attorney General Roberts, I. Henry Kutz* and *David D. Rosenstein* for the United States. Reported below: 172 Ct. Cl. 77, 348 F. 2d 485.

No. 766. PARADA-GONZALEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Allen S. Stim* and *Albert Felix* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 775. GREEN, DBA JIM GREEN'S TRUCKING CO. *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA. Sup. Ct. Cal. Certiorari denied. *Thomas S. Tobin* for petitioner. *Mary Moran Pajalich* for respondent.

No. 778. NATURAL RESOURCES, INC., ET AL. *v.* WINEBERG. C. A. 9th Cir. Certiorari denied. *James C. Dezendorf* for petitioners. Reported below: 349 F. 2d 685.

No. 779. GEORGE ET UX. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Charles Koozman* and *Burton M. Weinstein* for petitioners. *Solicitor General Marshall, Assistant Attorney General Douglas, Alan S. Rosenthal* and *Richard S. Salzman* for the United States.

No. 784. WATKINS ET AL. *v.* SUPERIOR COURT, LOS ANGELES COUNTY, ET AL. Dist. Ct. App. Cal., 2d App. Dist. Certiorari denied. *Jack Greenberg, Raymond L. Johnson* and *Anthony G. Amsterdam* for petitioners. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, *Harold W. Kennedy, George W. Wakefield* and *Evelle J. Younger* for respondents.

No. 799. MARSHALL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Raymond E. Sutton* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 352 F. 2d 1013.

No. 801. ATOMIC OIL CO. OF OKLAHOMA, INC. *v.* BARDAHL OIL CO. ET AL. C. A. 10th Cir. Certiorari denied. *Lawrence A. G. Johnson* and *Robert J. Woolsey* for petitioner. Reported below: 351 F. 2d 148.

No. 802. BETTILYON'S, INC., ET AL. *v.* UTAH, BY AND THROUGH ITS ROAD COMMISSION. Sup. Ct. Utah. Certiorari denied. *F. Burton Howard* for petitioners. Reported below: 17 Utah 2d 135, 405 P. 2d 420.

No. 785. Halko *v.* Anderson. C. A. 3d Cir. Certiorari denied. *Joseph Nissley* for petitioner.

No. 804. National Labor Relations Board *v.* Adams Dairy, Inc. C. A. 8th Cir. Certiorari denied. *Solicitor General Marshall, Dominick L. Manoli* and *Norton J. Come* for petitioner. *J. Leonard Schermer* for respondent. Reported below: 350 F. 2d 108.

No. 805. Sylvester et al. *v.* Messler, Administratrix. C. A. 6th Cir. Certiorari denied. *Paul B. Mayrand* for petitioners. *William J. Eggenberger* for respondent. Reported below: 351 F. 2d 472.

No. 806. Clark Marine Corp. *v.* Cargill, Inc., et al. C. A. 5th Cir. Certiorari denied. *Edward Donald Moseley* for petitioner. *Robert L. Stern, Erwin C. Heininger* and *Laurance W. Brooks* for respondents. Reported below: 345 F. 2d 79.

No. 807. Interstate Commerce Commission *v.* Northwest Agricultural Cooperative Association, Inc. C. A. 9th Cir. Certiorari denied. *Solicitor General Marshall, Robert W. Ginnane* and *Bernard A. Gould* for petitioner. *Frank E. Nash* for respondent. Reported below: 350 F. 2d 252.

No. 809. Winchester Drive-In Theatre, Inc., et al. *v.* Twentieth Century-Fox Film Corp. et al. C. A. 9th Cir. Certiorari denied. *Joseph L. Alioto* for petitioners. *Thomas E. Haven* and *Robert D. Raven* for respondents. Reported below: 351 F. 2d 925.

No. 817. Tansel *v.* Photon, Inc. C. A. 1st Cir. Certiorari denied. *Earl Babcock* and *Elliott I. Pollock* for petitioner. *Melvin R. Jenney* for respondent. Reported below: 349 F. 2d 856.

No. 813. Estate of Geiger et al. *v.* Commissioner of Internal Revenue. C. A. 8th Cir. Certiorari denied. *Phillip Steve Dandos* and *James M. McNally* for petitioners. *Solicitor General Marshall, Acting Assistant Attorney General Roberts* and *Harold C. Wilkenfeld* for respondent. Reported below: 352 F. 2d 221.

No. 819. Reoux *v.* First National Bank of Glens Falls, Executor. Ct. App. N. Y. Certiorari denied. *Peyton Ford* for petitioner. *Carl O. Olson* for respondent. Reported below: 16 N. Y. 2d 685, 209 N. E. 2d 546.

No. 767. Smaldone *v.* Colorado. Sup. Ct. Colo. Certiorari denied. The Chief Justice and Mr. Justice Black are of the opinion that certiorari should be granted. *Edward S. Barlock* for petitioner. *Duke W. Dunbar,* Attorney General of Colorado, *Frank E. Hickey,* Deputy Attorney General, and *John E. Bush,* Assistant Attorney General, for respondent. Reported below: — Colo. —, 405 P. 2d 208.

No. 768. Salardino *v.* Colorado. Sup. Ct. Colo. Certiorari denied. The Chief Justice and Mr. Justice Black are of the opinion that certiorari should be granted. *Edward S. Barlock* for petitioner. *Duke W. Dunbar,* Attorney General of Colorado, *Frank E. Hickey,* Deputy Attorney General, and *John E. Bush,* Assistant Attorney General, for respondent. Reported below: — Colo. —, 405 P. 2d 211.

No. 102, Misc. Shipp *v.* Wilson, Warden. Sup. Ct. Cal. Certiorari denied. Reported below: 62 Cal. 2d 547, 399 P. 2d 571.

No. 169, Misc. Stiltner *v.* Rhay, Penitentiary Superintendent. Sup. Ct. Wash. Certiorari denied.

No. 788. Quintana *v.* Colorado. Sup. Ct. Colo. Certiorari denied. The Chief Justice and Mr. Justice Black are of the opinion that certiorari should be granted. *Edward S. Barlock* for petitioner. *Duke W. Dunbar,* Attorney General of Colorado, *Frank E. Hickey,* Deputy Attorney General, and *John E. Bush,* Assistant Attorney General, for respondent. Reported below: — Colo. —, 405 P. 2d 212.

No. 70, Misc. Coor *v.* United States. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 119 U. S. App. D. C. 259, 340 F. 2d 784.

No. 85, Misc. Selz *v.* California. Sup. Ct. Cal. Certiorari denied. Petitioner *pro se. Thomas C. Lynch,* Attorney General of California, and *Edsel W. Haws* and *Raymond M. Momboisse,* Deputy Attorneys General, for respondent.

No. 274, Misc. Johnson *v.* Maryland. Ct. App. Md. Certiorari denied. *Charles P. Howard, Jr.,* for petitioner. Reported below: 238 Md. 140, 207 A. 2d 643.

No. 311, Misc. Grossi *v.* Heinze, Warden, et al. C. A. 9th Cir. Certiorari denied. Petitioner *pro se. Thomas C. Lynch,* Attorney General of California, and *Doris H. Maier,* Assistant Attorney General, for respondents.

No. 348, Misc. Nuole *v.* California. Sup. Ct. Cal. Certiorari denied. Petitioner *pro se. Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Jack K. Weber,* Deputy Attorney General, for respondent.

No. 396, Misc. MELTON *v.* COLORADO. Sup. Ct. Colo. Certiorari denied. Petitioner *pro se*. *Duke W. Dunbar*, Attorney General of Colorado, *Frank E. Hickey*, Deputy Attorney General, and *John P. Moore*, Assistant Attorney General, for respondent. Reported below: — Colo. —, 401 P. 2d 605.

No. 429, Misc. RUUD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Daniel H. Benson* for the United States. Reported below: 347 F. 2d 321.

No. 448, Misc. CUEVAS *v.* SDRALES, DBA SEVENTY-THREE INN, ET AL. C. A. 10th Cir. Certiorari denied. *George H. Searle* for petitioner. *Gerald R. Miller* and *Shirley P. Jones* for respondents. Reported below: 344 F. 2d 1019.

No. 454, Misc. WATTS *v.* MARONEY, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 476, Misc. WHITE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg* for the United States. Reported below: 120 U. S. App. D. C. 319, 346 F. 2d 800.

No. 494, Misc. UNSWORTH *v.* OREGON. Sup. Ct. Ore. Certiorari denied. Reported below: 240 Ore. 453, 402 P. 2d 507.

No. 512, Misc. PONTON *v.* OREGON. Sup. Ct. Ore. Certiorari denied. *Howard R. Lonergan* for petitioner. *George Van Hoomissen* for respondent. Reported below: 240 Ore. 30, 399 P. 2d 30.

No. 514, Misc. **Gardner** *v.* **United States.** C. A. 7th Cir. Certiorari denied. *Charles L. Decker* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 347 F. 2d 405.

No. 525, Misc. **Wright** *v.* **United States.** C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States.

No. 536, Misc. **Aubel** *v.* **United States.** C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States.

No. 589, Misc. **Giraud** *v.* **United States.** C. A. 9th Cir. Certiorari denied. *Charles P. Scully* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 348 F. 2d 820.

No. 632, Misc. **Brooks** *v.* **Florida.** Sup. Ct. Fla. Certiorari denied.

No. 650, Misc. **Lesco** *v.* **Kansas.** Sup. Ct. Kan. Certiorari denied. Reported below: 194 Kan. 555, 400 P. 2d 695.

No. 663, Misc. **Schantz** *v.* **Arizona.** Sup. Ct. Ariz. Certiorari denied. *John P. Frank* for petitioner. *Darrell F. Smith,* Attorney General of Arizona, and *Paul G. Rosenblatt,* Assistant Attorney General, for respondent. Reported below: 98 Ariz. 200, 403 P. 2d 521.

No. 716, Misc. **Cimino** *v.* **United States.** C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States.

No. 688, Misc. NICHOLS *v.* RANDOLPH, WARDEN. C. A. 7th Cir. Certiorari denied. Petitioner *pro se.* *William G. Clark,* Attorney General of Illinois, and *Richard A. Michael* and *Philip J. Rock,* Assistant Attorneys General, for respondent.

No. 696, Misc. BRADLEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 347 F. 2d 121.

No. 749, Misc. GRANT *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied.

No. 775, Misc. COPESTICK *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied.

No. 776, Misc. SCHACK *v.* FLORIDA. C. A. 5th Cir. Certiorari denied.

No. 781, Misc. JOHNSON *v.* TINSLEY, WARDEN. C. A. 10th Cir. Certiorari denied. *Isaac Mellman* and *Gerald N. Mellman* for petitioner.

No. 806, Misc. DAVIS *v.* PEYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 811, Misc. MARCELLA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 344 F. 2d 876.

No. 814, Misc. LEHMAN *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied.

No. 819, Misc. **Robbins** *v.* **California.** Sup. Ct. Cal. Certiorari denied.

No. 820, Misc. **Stewart** *v.* **Smith, U. S. District Judge.** C. A. 6th Cir. Certiorari denied.

No. 823, Misc. **Scott** *v.* **United States.** C. A. D. C. Cir. Certiorari denied. Petitioner *pro se. Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 840, Misc. **O'Callahan** *v.* **Attorney General of the United States.** C. A. 1st Cir. Certiorari denied. Petitioner *pro se. Solicitor General Marshall, Assistant Attorney General Doar* and *David L. Norman* for respondent. Reported below: 351 F. 2d 43.

No. 866, Misc. **Coggins** *v.* **United States.** C. A. D. C. Cir. Certiorari denied. Petitioner *pro se. Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg* for the United States.

No. 871, Misc. **Cardarella** *v.* **United States.** C. A. 8th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Marshall* for the United States. Reported below: 351 F. 2d 272.

No. 880, Misc. **Gilmore** *v.* **California.** Dist. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 881, Misc. **Finley** *v.* **California.** Sup. Ct. Cal. Certiorari denied.

No. 888, Misc. **Freeman** *v.* **Maxwell, Warden.** Sup. Ct. Ohio. Certiorari denied.

No. 885, Misc. **Trest** *v.* **United States.** C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 122 U. S. App. D. C. 11, 350 F. 2d 794.

No. 893, Misc. **Moss** *v.* **California et al.** Sup. Ct. Cal. Certiorari denied.

No. 899, Misc. **Hafiz** *v.* **Maxwell, Warden.** Sup. Ct. Ohio. Certiorari denied.

No. 900, Misc. **Deckert** *v.* **Maroney, Correctional Superintendent.** C. A. 3d Cir. Certiorari denied.

No. 905, Misc. **Kousick** *v.* **Klinger et al.** Sup. Ct. Cal. Certiorari denied.

No. 906, Misc. **Twyman** *v.* **Myers, Correctional Superintendent.** Sup. Ct. Pa. Certiorari denied.

No. 914, Misc. **Austin** *v.* **Maine et al.** Sup. Jud. Ct. Me. Certiorari denied. Petitioner *pro se*. *John W. Benoit*, Assistant Attorney General of Maine, for respondents.

No. 920, Misc. **Croom** *v.* **Follette, Warden.** C. A. 2d Cir. Certiorari denied.

No. 927, Misc. **Jodon** *v.* **Russell, Correctional Superintendent.** C. A. 3d Cir. Certiorari denied.

No. 946, Misc. **Conerly** *v.* **United States.** C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States. Reported below: 350 F. 2d 679.

No. 944, Misc. **Mundt et al.** *v.* **Home Federal Savings & Loan Association et al.** C. A. 9th Cir. Certiorari denied. Reported below: 349 F. 2d 938.

No. 930, Misc. **Wilson** *v.* **Maroney, Correctional Superintendent.** C. A. 3d Cir. Certiorari denied.

No. 934, Misc. **Castillo** *v.* **Fay, Warden.** C. A. 2d Cir. Certiorari denied. *Leon B. Polsky* for petitioner. *Frank S. Hogan, H. Richard Uviller* and *Malvina H. Guggenheim* for respondent. Reported below: 350 F. 2d 400.

No. 941, Misc. **Corcoran** *v.* **California.** C. A. 9th Cir. Certiorari denied.

No. 943, Misc. **Finley** *v.* **California.** C. A. 9th Cir. Certiorari denied.

No. 948, Misc. **Chance** *v.* **Kansas.** Sup. Ct. Kan. Certiorari denied. Reported below: 195 Kan. 430, 407 P. 2d 236.

No. 949, Misc. **Powell** *v.* **Maxwell, Warden.** C. A. 6th Cir. Certiorari denied. Reported below: 350 F. 2d 353.

No. 952, Misc. **Cervantes** *v.* **Rhay, Penitentiary Superintendent.** Sup. Ct. Wash. Certiorari denied.

No. 953, Misc. **Mickels** *v.* **Rhay, Penitentiary Superintendent.** Sup. Ct. Wash. Certiorari denied.

No. 955, Misc. **Gorman** *v.* **Kings Mercantile Co., Inc., et al.** Ct. App. N. Y. Certiorari denied. *Jacob Rassner* for petitioner. *John J. Boyle* for respondent Title Guarantee Co.

No. 954, Misc. HOLLIS *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 352 F. 2d 550.

No. 959, Misc. CARDARELLA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States. Reported below: 351 F. 2d 443.

No. 960, Misc. MERRILL *v.* ALASKA. Sup. Ct. Alaska. Certiorari denied.

No. 965, Misc. BELL *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 395 S. W. 2d 784.

No. 972, Misc. MILLIGAN *v.* WILSON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 978, Misc. ZANCA *v.* MAIMONIDES HOSPITAL. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 79, Misc. WARNER *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Petitioner *pro se*. *Robert Matthews,* Attorney General of Kentucky, and *Joseph H. Eckert,* Assistant Attorney General, for respondent. Reported below: 386 S. W. 2d 455.

No. 481, Misc. ALFORD *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Petitioner *pro se*. *Darrell F. Smith,* Attorney General of Arizona, and *Paul G. Rosenblatt,* Assistant Attorney General, for respondent. Reported below: 98 Ariz. 124, 402 P. 2d 551.

No. 981, Misc. COPESTICK *v.* RHAY, PENITENTIARY SUPERINTENDENT. Sup. Ct. Wash. Certiorari denied.

No. 988, Misc. **Taylor** *v.* **Walker, Warden.** C. A. 10th Cir. Certiorari denied.

No. 1110, Misc. **Hutchins** *v.* **Dunbar, Corrections Director.** C. A. 9th Cir. Certiorari denied.

Rehearing Denied.

No. 305. **Derfus** *v.* **California**, *ante,* p. 955;
No. 343. **Cudia et al.** *v.* **United States**, *ante,* p. 955;
No. 520. **Wilson** *v.* **Commissioner of Internal Revenue**, *ante,* p. 108;
No. 534. **Battaglia** *v.* **United States**, *ante,* p. 955;
No. 607. **Andrews** *v.* **United States**, *ante,* p. 956;
No. 703. **Postell et al.** *v.* **United States**, *ante,* p. 956;
No. 706. **Andrews et al.** *v.* **United States**, *ante,* p. 956;
No. 707. **Owens et al.** *v.* **United States**, *ante,* p. 956;
No. 621. **Hill** *v.* **United States et al.**, *ante,* p. 956; and
No. 211, Misc. **Syverson** *v.* **United States**, *ante,* p. 961. Petitions for rehearing denied.

January 26, 1966.

Dismissal Under Rule 60.

No. 411. **Marsh, Secretary of State of Nebraska, et al.** *v.* **Dworak et al.** Appeal from D. C. Neb. Appeal dismissed pursuant to Rule 60 of the Rules of this Court. *Clarence A. H. Meyer,* Attorney General of Nebraska, *Richard H. Williams,* Assistant Attorney General, and *Robert A. Nelson,* Special Assistant Attorney General, for appellants. *August Ross* and *Robert E. O'Connor* for appellees. Reported below: 242 F. Supp. 357.

JANUARY 31, 1966.

Miscellaneous Orders.

No. 18, Original. ILLINOIS *v.* MISSOURI. The amended complaint is filed and the State of Missouri is allotted 60 days to answer the complaint, as amended. *William G. Clark,* Attorney General of Illinois, *Richard A. Michael,* Assistant Attorney General, and *Terence F. MacCarthy,* Special Assistant Attorney General, for plaintiff. [For earlier orders herein, see 379 U. S. 952; 380 U. S. 901, 969; *ante,* p. 803.]

No. 1023, Misc. JAMES *v.* CALIFORNIA; and
No. 1040, Misc. LISHEY *v.* WILSON, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 1050, Misc. GORHAM *v.* FITZHARRIS, CORRECTIONAL SUPERINTENDENT. Motion for leave to file petition for writ of habeas corpus and for other relief denied.

No. 984, Misc. HERB *v.* FLORIDA. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for writ of certiorari, certiorari is denied.

No. 1044, Misc. MORRISON *v.* DAVIS, CLERK OF THE UNITED STATES SUPREME COURT. Motion for leave to file petition for writ of mandamus denied.

Probable Jurisdiction Postponed.

No. 273, Misc. SPENCER *v.* TEXAS. Appeal from Ct. Crim. App. Tex. Motion for leave to proceed *in forma pauperis* granted and further consideration of the question of jurisdiction in this case postponed to the hearing of the case on the merits. The case is transferred to the appellate docket and set for oral argument immediately following No. 128, Misc. *Louis V. Nelson* for appellant. *Waggoner Carr,* Attorney General of Texas, *Hawthorne Phillips,* First Assistant Attorney General, *T. B. Wright,* Executive Assistant Attorney General, and *Howard M. Fender, Charles B. Swanner* and *Gilbert J. Pena,* Assistant Attorneys General, for appellee. Reported below: 389 S. W. 2d 304.

Certiorari Granted. (See also No. 274, *ante,* p. 456.)

No. 506. ADDERLEY ET AL. *v.* FLORIDA. Dist Ct. App. Fla., 1st Dist. Certiorari granted. *Richard Yale Feder* and *Tobias Simon* for petitioners. *Earl Faircloth,* Attorney General of Florida, and *William D. Roth,* Assistant Attorney General, for respondent.

No. 128, Misc. BELL *v.* TEXAS. Ct. Crim. App. Tex. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari granted. The case is transferred to the appellate docket. Petitioner *pro se. Waggoner Carr,* Attorney General of Texas, *Hawthorne Phillips,* First Assistant Attorney General, *T. B. Wright,* Executive Assistant Attorney General, and *Howard M. Fender, Gilbert J. Pena* and *Charles B. Swanner,* Assistant Attorneys General, for respondent. Reported below: 387 S. W. 2d 411.

No. 724. OSBORN *v.* UNITED STATES. C. A. 6th Cir. Certiorari granted. MR. JUSTICE WHITE and MR. JUSTICE FORTAS took no part in the consideration or decision of this petition. *Jacob Kossman* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 350 F. 2d 497.

No. 794. Hoffa *v.* United States;

No. 795. Parks *v.* United States;

No. 796. Campbell *v.* United States; and

No. 797. King *v.* United States. C. A. 6th Cir. Motion of the Criminal Courts Bar Association of Los Angeles for leave to file a brief, as *amicus curiae* in No. 794, granted. The petitions for writs of certiorari are also granted limited to the following question:

"Whether evidence obtained by the Government by means of deceptively placing a secret informer in the quarters and councils of a defendant during one criminal trial so violates the defendant's Fourth, Fifth and Sixth Amendment rights that suppression of such evidence is required in a subsequent trial of the same defendant on a different charge."

The cases are consolidated and a total of three hours is allotted for oral argument. Mr. Justice White and Mr. Justice Fortas took no part in the consideration or decision of this motion or these petitions.

Morris A. Shenker and *Joseph A. Fanelli* for petitioner in No. 794. *Jacques M. Schiffer* for petitioner in No. 795. *Cecil D. Branstetter* for petitioner in No. 796. *P. D. Maktos, John Maktos, Moses Krislov* and *Harold E. Brown* for petitioner in No. 797. *Solicitor General Marshall, Assistant Attorney General Vinson, Nathan Lewin* and *Robert S. Erdahl* for the United States. *Morris Levine* for Criminal Courts Bar Association of Los Angeles, as *amicus curiae,* in support of the petition in No. 794. Reported below: 349 F. 2d 20.

No. 811. Lewis *v.* United States. C. A. 1st Cir. Certiorari granted. *S. Myron Klarfeld* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 352 F. 2d 799.

No. 831. Switzerland Cheese Association, Inc., et al. *v.* E. Horne's Market, Inc. C. A. 1st Cir. Certiorari granted. *John J. McGlew* and *Alfred E. Page* for petitioners. Reported below: 351 F. 2d 552.

No. 268, Misc. Reed *v.* Beto, Corrections Director. C. A. 5th Cir. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari granted. The case is transferred to the appellate docket and set for oral argument immediately following No. 273, Misc. *Charles W. Tessmer, Clyde W. Woody* and *Emmett Colvin, Jr.,* for petitioner. *Waggoner Carr,* Attorney General of Texas, *Hawthorne Phillips,* First Assistant Attorney General, *T. B. Wright,* Executive Assistant Attorney General, and *Gilbert J. Pena, Charles B. Swanner* and *Howard M. Fender,* Assistant Attorneys General, for respondent. Reported below: 343 F. 2d 723.

Certiorari Denied. (See also No. 966, Misc., *ante,* p. 455; and No. 984, Misc., *supra.*)

No. 712. Velsicol Chemical Corp. *v.* Golden Gate Hop Ranch, Inc. Sup. Ct. Wash. Certiorari denied. *William A. Helsell* for petitioner. *C. W. Halverson* for respondent. Reported below: 66 Wash. 2d 469, 403 P. 2d 351.

No. 773. Sociedad Maritima San Nicholas, S. A., et al. *v.* Bouas. C. A. 2d Cir. Certiorari denied. *Melvin J. Tublin* for petitioners. *Isaac Salem* for respondent.

No. 810. Simpson et al. *v.* United States. C. A. D. C. Cir. Certiorari denied. *Edward L. Carey* and *Walter E. Gillcrist* for petitioners. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 492. McFADDIN EXPRESS, INC., ET AL. *v.* ADLEY CORP. ET AL. C. A. 2d Cir. Certiorari denied. *Tobias Weiss* for petitioners. *Joseph P. Cooney* for Adley Corp. et al., and *Solicitor General Marshall* for the United States, respondents. Reported below: 346 F. 2d 424.

No. 659. ROSS *v.* STANLEY ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE FORTAS took no part in the consideration or decision of this petition. *William E. Haudek* for petitioner. *M. W. Wells* for Stanley et al.; *David W. Hedrick* for Midwestern Constructors, Inc., et al.; *John Bingham* for Harbert Construction Corp.; and *Robert F. Campbell* and *R. Y. Patterson, Jr.*, for Florida Gas Co. et al., respondents. Reported below: 346 F. 2d 645.

No. 816. GOVERNMENT EMPLOYEES INSURANCE CO. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Lowell White* for petitioner. *Solicitor General Marshall, Assistant Attorney General Douglas* and *Alan S. Rosenthal* for the United States. Reported below: 349 F. 2d 83.

No. 827. UNITED STATES FIDELITY & GUARANTY CO. *v.* WINKLER ET AL. C. A. 8th Cir. Certiorari denied. *Roy F. Carter* for petitioner. *Charles L. Bacon* and *Vincent E. Baker* for respondents. Reported below: 351 F. 2d 685.

No. 833. HOUSTON CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. *L. G. Clinton, Jr.*, and *Tom M. Davis* for petitioners. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 349 F. 2d 449.

No. 743. Indiana Broadcasting Corp. *v.* Commissioner of Internal Revenue. C. A. 7th Cir. Certiorari denied. *Whitman Knapp* and *Martin F. Richman* for petitioner. *Solicitor General Marshall, Acting Assistant Attorney General Roberts* and *Robert A. Bernstein* for respondent. *Douglas A. Anello* for National Association of Broadcasters, as *amicus curiae,* in support of the petition. Reported below: 350 F. 2d 580.

No. 828. Lichota et ux. *v.* United States. C. A. 6th Cir. Certiorari denied. *Sumner Canary* for petitioners. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 351 F. 2d 81.

No. 835. Republic of Iraq *v.* First National City Bank, Administrator. C. A. 2d Cir. Certiorari denied. *Leo C. Fennelly* for petitioner. *Herbert Brownell* and *Woodson D. Scott* for respondent. Reported below: 353 F. 2d 47.

No. 844. Miller *v.* United States. C. A. 9th Cir. Certiorari denied. *Burton Marks* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 351 F. 2d 598.

No. 732, Misc. Vasquez-Ochoa *v.* United States et al. C. A. 9th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Marshall* for the United States et al.

No. 872. Dexter et al. *v.* United States. C. A. 5th Cir. Motion to dispense with printing the petition granted. Certiorari denied. *David Goldman* for petitioners. *Solicitor General Marshall* for the United States. Reported below: 351 F. 2d 461.

No. 883, Misc. Streeter *v.* Alabama. Sup. Ct. Ala. Certiorari denied. *Crampton Harris* for petitioner. Reported below: 278 Ala. 272, 177 So. 2d 826.

No. 865. Frank *v.* Tomlinson, District Director of Internal Revenue. C. A. 5th Cir. Certiorari denied. *Arthur B. Cunningham* and *Philip T. Weinstein* for petitioner. *Solicitor General Marshall, Acting Assistant Attorney General Roberts, Joseph M. Howard* and *John M. Brant* for respondent. Reported below: 351 F. 2d 384.

No. 820. United States *v.* International Business Machines Corp. Ct. Cl. Motion of counsel in No. 922 to defer consideration of the petition in No. 820 denied. Certiorari denied. *Solicitor General Marshall, Acting Assistant Attorney General Roberts, Jack S. Levin, Harry Baum* and *Robert A. Bernstein* for the United States. *Daniel M. Gribbon, William H. Allen* and *Brice M. Clagett* for respondent. *William Lee McLane* on the motion. *William H. Allen* in opposition to the motion. Reported below: 170 Ct. Cl. 357, 343 F. 2d 914.

No. 848, Misc. Beatty *v.* United States. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 350 F. 2d 287.

No. 873, Misc. Brown *v.* United States. C. A. 7th Cir. Certiorari denied. *Thomas B. McNeill* for petitioner. *Solicitor General Marshall, Assistant Attorney General Doar* and *David L. Norman* for the United States. Reported below: 351 F. 2d 564.

No. 834, Misc. Williams *v.* California. Sup. Ct. Cal. Certiorari denied.

No. 886, Misc. **Chase** *v.* **Robbins, Warden.** C. A. 1st Cir. Certiorari denied.

No. 887, Misc. **Hackett** *v.* **United States.** C. A. 6th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 348 F. 2d 883.

No. 890, Misc. **Castro** *v.* **United States.** Sup. Ct. Cal. Certiorari denied.

No. 898, Misc. **McIntosh** *v.* **United States.** C. A. 6th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Marshall* for the United States.

No. 971, Misc. **Baker** *v.* **Illinois.** Cir. Ct. Ill., Marion County. Certiorari denied.

No. 910, Misc. **Shores** *v.* **United States.** C. A. 5th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 352 F. 2d 485.

No. 940, Misc. **Lewis** *v.* **LaVallee, Warden.** C. A. 2d Cir. Certiorari denied.

No. 977, Misc. **Andrews** *v.* **Smith et al.** App. Ct. Ill., 2d Dist. Certiorari denied. *John R. Snively* for petitioner. *William W. Peterson* and *Russell E. Smith* for respondents. Reported below: 54 Ill. App. 2d 51, 203 N. E. 2d 160.

No. 958, Misc. **Cooper** *v.* **United States.** C. A. D. C. Cir. Certiorari denied.

No. 997, Misc. **Wellman** *v.* **California.** Sup. Ct. Cal. Certiorari denied.

No. 968, Misc. HATCHER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Robert Reed Gray* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 122 U. S. App. D. C. 148, 352 F. 2d 364.

No. 907, Misc. KENNEY ET AL. *v.* TRINIDAD CORP. C. A. 5th Cir. Certiorari denied. *Benjamin E. Smith* and *Arthur Mandell* for petitioners. *Benjamin W. Yancey* for respondent. Reported below: 349 F. 2d 832.

No. 976, Misc. FEIST *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 1000, Misc. McFARLAND *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se. Solicitor General Marshall* for the United States.

No. 1026, Misc. JOHNSON ET AL. *v.* LLOYD. C. A. D. C. Cir. Certiorari denied. *Thurman L. Dodson* for petitioners. *James F. Temple* for respondent.

No. 931, Misc. PARKER *v.* BOARD OF EDUCATION, PRINCE GEORGE'S COUNTY, MARYLAND. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Robert H. Reiter* for petitioner. Reported below: 348 F. 2d 464.

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No. 557. INTERNATIONAL TERMINAL OPERATING CO., INC. *v.* N. V. NEDERL. AMERIK STOOMV. MAATS., *ante,* p. 283. Petition for rehearing denied.

No. 718, Misc. WILLIAMSON ET AL. *v.* BLANKENSHIP, JUDGE, ET AL., *ante,* p. 923. Motion for leave to file petition for rehearing denied.

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Interstate railroads—State full-crew laws and Public Law 88–108.—It was not the legislative purpose of Public Law 88–108 to pre-empt the field of manning-level regulation and supersede States' full-crew laws, nor was that the effect of the statute or the arbitration awards made thereunder. Engineers v. Chicago, R. I. & P. R. Co., p. 423.

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